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November 4th, 1867.

THE

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Equity Cases

BEFORE

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AND THE

VICE-CHANCELLORS.

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Equity Cases

BEFORE

THE MASTER OF THE ROLLS,

AND THE

VICE-CHANCELLORS.

HOARE *v.* WILSON.

M. R.
1867
March 14.

Suit by Copyhold Tenant—Order for production of Documents—Customary Fees of Steward of Manor.

A copyhold tenant, in a suit against the lord of the manor, is entitled to the usual order for the production of documents, including the court rolls, without payment to the steward of the customary fees.

In this suit, which was instituted by the copyhold tenants of the manor of *Hampstead*, against Sir *T. M. Wilson*, the lord of the manor, an order had been obtained, on the application of the Plaintiffs, that the Defendant should produce at the office of his solicitor, who was steward of the manor, such documents as were in his possession, which the Plaintiffs were to be at liberty to inspect, and peruse, and to make copies of the same.

The documents to which the order related consisted of court rolls, and other deeds and papers relating to the manor.

The Defendant now applied to the Court, on an adjourned summons, that the order might be varied by adding the words, "after payment to the steward of the manor of *Hampstead* of his customary fees."

Mr. *Selwyn*, Q.C., and Mr. *Eddis*, in support of the application:—

The steward, as custodian of the court rolls for the benefit of all

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the copyhold tenants as well as the lord, is entitled to his customary fees when any tenant desires to inspect them. He cannot be debarred of this right because a copyhold tenant is Plaintiff in a suit, and takes out a summons for their production. In *Warriner* v. *Giles* (1), in an action of ejectment by the tenant of one of the *London* markets, the boundaries of which had been set out by the City after the fire of *London*, the Plaintiff moved for liberty to inspect the books and take copies, which was granted, and "the Court compared it to a case of court rolls, which were not considered as the evidence of the lord, but in the nature of public books, for the benefit of the tenant as well as the lord."

These, therefore, are *quasi* public documents, and, though the right of the Plaintiff to inspect them is not disputed, yet the steward is fairly entitled to his customary fees, as a *quantum meruit*, for the care he takes of them, for if they were lost or tampered with he would be responsible, not only to the lord, but to those tenants whose titles depend upon them. At common law a mandamus to compel the lord to produce the documents would only issue on an affidavit that a proper application had been made and refused. We submit, therefore, that, as the tenants could, on payment of the fees, inspect the documents without the order of this Court, the Court will not, because this suit has been instituted, deprive the steward of his fees.

Mr. *Joshua Williams*, Q.C., and Mr. *Speed*, for the Plaintiffs, were not called upon.

LORD ROMILLY, M.R.:—

This is a novel point. There have been many suits about customs of manors, and many orders made for the production of documents of manors, or for an inspection of them. But, unquestionably, I never heard before that, under an order of the Court, the steward could decline to produce them unless the fees for inspection were paid. Before a suit is instituted a copyholder may inspect documents upon paying the usual fees, and all that the case which has been cited by Mr. *Selwyn* establishes is this, that if the motion had been resisted, the order would have been

(1) Str. 954.

made *in invitum*, for they are documents which the Plaintiff has a right to inspect, and to have produced in the cause, in the ordinary mode in which every Plaintiff is entitled to inspect documents in the hands of a Defendant, in which he has a common interest with the Defendant. Therefore I must refuse the application with costs.

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Solicitor for the Plaintiffs: Mr. *P. H. Lawrence.*
Solicitor for the Defendant: Mr. *Alfred Clark.*

ANGLO-DANUBIAN COMPANY *v.* ROGERSON.

M. R. 1867 *April* 16, 18.

Practice—Jurisdiction—Election between Suit and Action—Damages—21 & 22 Vict. c. 27.

A. filed a bill against *B.* for the cancellation of bills of exchange, drawn by *B.* and accepted by *A.* in part performance of a contract, of which *B.* failed to perform his part, and for an injunction to restrain *B.* from parting with or suing on the bills; and, pending the suit, *A.* commenced an action against *B.* for damages for breach of the contract:—

Held, that the suit and action were not for the same matter, and an order to elect obtained by *B.* was discharged.

Lord Cairns' Act (21 & 22 Vict. c. 27) does not diminish the rights of suitors; therefore a Plaintiff in equity, who would before the Act have been allowed at the same time to sue the Defendant at law for damages, may still do so, although he might, under the Act, pray for and obtain damages in the suit.

THIS was a motion, on behalf of the Plaintiffs, to discharge an order, obtained by the Defendant *Rogerson*, requiring the Plaintiffs to elect between proceeding at law and in equity.

The bill, which was filed in November, 1863, alleged that an agreement was made on the 2nd of June, 1863, between the Plaintiffs, the *Anglo-Danubian Steam Navigation and Colliery Company, Limited*, and the Defendants *Rogerson* and *Scott*, trading in partnership under the name of *John Rogerson & Co.*, for the sale by the Defendants to the Plaintiffs, for £7500, of two ships, to be dispatched immediately and to be delivered to the Plaintiffs on the *Danube*, the purchase-money to be paid as follows:—£2000 to be paid to *Rogerson* on his taking and paying up 200 £10 shares in the Plain-

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1867
ANGLO-DANUBIAN COMPANY v. ROGERSON.

tiffs' company, and the remaining £5500 by the Plaintiffs' acceptances, and the payment of such acceptances to be secured by a mortgage of the ships and a mortgage of the future calls on the shareholders; that, on the 6th of June, 1863, the 200 shares were allotted to *Rogerson*, and, at the same time, a cheque for £2000, drawn by *Rogerson* in the name of the Defendants in favour of the Plaintiffs, was given to the Plaintiffs, and a cheque for £2000, drawn by the Plaintiffs in favour of the Defendants, was given to *Rogerson*, both of which cheques were duly paid; that seven bills of exchange, for sums amounting to £5500, were drawn by *Rogerson* upon the Plaintiffs and accepted by them; that the Defendants failed to deliver the ships according to the agreement, but had nevertheless sued and recovered judgment against the Plaintiffs on some of the bills; and it prayed (1.) that the bills might be delivered up and cancelled, and that the judgments might be set aside, or that satisfaction might be entered up upon them; (2.) that the Defendants might be restrained from negotiating, or parting with, or suing upon, the bills, or enforcing the judgments; (3.) that the Defendants might repay to the Plaintiffs the £2000 paid to them on the 6th of June, 1863; and (4.) that damages might be assessed by the Court and paid by the Defendants in respect of the non-delivery of the ships.

The Defendants filed separate answers in May, 1865, *Rogerson* denying the alleged breach of contract, and *Scott* repudiating the contract, as made without his knowledge or authority.

In March, 1867, the Plaintiffs amended the bill by striking out the prayer for damages, and immediately afterwards commenced an action against the Defendants for damages in respect of their breach of contract by non-delivery of the ships.

The Defendant *Rogerson* thereupon obtained *ex parte* the common order to elect, upon the allegation that the Plaintiffs were prosecuting him at law and in equity for the same matter.

Mr. *Southgate*, Q.C. (Mr. *Locock Webb* with him), for the Plaintiffs:—

The action and the suit, though arising from the same transaction, are for distinct and different objects. The Plaintiffs are entitled to be relieved from their legal liability upon the bills of

exchange accepted by them as the consideration for a contract, which the Defendants have failed to perform, and which cannot now be performed, and they are also entitled to damages for the loss of a valuable contract. The former relief they can obtain only in equity, the latter only at law. In *Fennings* v. *Humphery* (1), where a Plaintiff was suing for specific performance of part of a contract, he was allowed at the same time to sue the Defendant at law for damages for the breach of another part of the contract, of which this Court could not enforce specific performance. It will be said that the Plaintiffs might have got damages in this Court under *Lord Cairns' Act* (21 & 22 Vict. c. 27); but it is, to say the least, doubtful whether that Act applies to this case, in which damages are sought, not in respect of the wrongful act against which the injunction is asked, but in respect of the breach of a contract which cannot be specifically performed. And, assuming the Act to apply, it was intended to enlarge, not to diminish, the remedies of suitors, and the Plaintiffs are entitled to obtain relief at law upon a distinct, though collateral, matter without forfeiting their right to relief in this suit.

Mr. *Selwyn*, Q.C., and Mr. *Marten*, for the Defendant:—

The action and the suit, although seeking for different relief, are really for the same matter and depend upon the same question. If the contract has been broken, the Plaintiffs are entitled to injunction and damages; if it has not, they are entitled to neither relief. In fact, the declaration in the action is a neat abridgment of the bill in this suit. In such a case, even before *Lord Cairns' Act*, this Court, having once obtained jurisdiction, would not have allowed either party to raise the same question at law, but would have compelled them to submit their legal rights to the control of this Court: *Phelps* v. *Prothero* (2); *Brenan* v. *Preston* (3); and would, if necessary, have given damages: *Phelps* v. *Prothero*; *Lillie* v. *Legh* (4); *Gedye* v. *Duke of Montrose* (5). In *Fennings* v. *Humphery*, the action and suit related to two distinct parts of the contract. It is clear that under *Lord Cairns' Act* this Court

(1) 4 Beav. 1.
(2) 7 D. M. & G. 722, 734, 2 Jur. N.S. 173
(3) 10 Hare, 331.
(4) 3 De G. & J. 204.
(5) 26 Beav. 45.

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can give the Plaintiffs the relief they are seeking at law, this being a case in which the Court has jurisdiction to grant an injunction against a wrongful act, and the Court will not allow them to have the same question tried simultaneously in both Courts. If at the hearing of the cause the Court should think that the question of damages can be more conveniently tried at law, it can so direct.

Mr. *Southgate*, in reply:—

There is no reason why a Plaintiff should not obtain distinct relief at law and in equity on account of the same transaction; thus a mortgagee may sue the mortgagor at law upon his covenant, and at the same time file a bill for foreclosure. The cases cited on the other side only shew that a Plaintiff cannot obtain specific performance of an agreement, and at the same time get damages at law for the breach of the same agreement. If the Plaintiffs are not to be allowed to proceed at law until after the hearing, they may be barred by the *Statute of Limitations*.

April 18. LORD ROMILLY, M.R.:—

In this case a question arises, which I think is one of considerable importance. This is a bill filed for the purpose of asking that certain bills of exchange may be delivered up to the Plaintiffs, and that the holders of the bills may be restrained by the injunction of the Court from negotiating or parting with them, or suing upon them, and also that the Defendants may be required to repay a sum of £2000 paid to them at a particular time, and also that they shall pay the costs of the suit. That is the whole bill, as it now stands. The bill originally prayed compensation in the shape of damages for the breach of the contract entered into between the Plaintiffs and the Defendants; that has been struck out by amendment, and now the bill only prays that which I have stated. The Plaintiffs have commenced an action at law against the Defendants for damages for breach of the contract. The Defendant *Rogerson* has obtained the usual order for the Plaintiffs to elect whether they will proceed at law or in equity, and this is a motion to discharge that order.

Now, I have read the bill and the declaration, and the declaration, as it is very truly said, is a very neat abstract of the contents of the bill; but it really is for a totally different object; it is for the recovery of damages, which are not to be obtained, and which, as the bill stands, cannot be obtained by the suit in equity; the action is to recover damages in respect of the breach of the contract, and the declaration says nothing about the bills of exchange, or the delivery up of any bills of exchange, or the like.

I will first consider how the question stands apart from *Lord Cairns' Act*, which gives to this Court the power to award damages in certain cases.

The only question is, whether the objects of the suit and the action are identically the same. I have stated already that the objects really are different; it is true that where the objects are so far the same, that what is sued for in this Court brings with it, as a necessary consequence, that which is sought to be recovered by the action, although they are not technically the same, the Court will treat them as identical; but here they appear to me to be perfectly distinct.

A. enters into a contract with *B.*, in consideration of the performance of which by *B.*, *A.* gives *B.* a bill of exchange; *B.* does not perform his contract, and he sues *A.* upon the bill of exchange, in addition to which *A.* loses a considerable sum of money by reason of the non-performance of the contract. *A.* comes to this Court and files his bill, and says, "This is a fraud; you are suing me upon a bill of exchange which was given in consideration of a contract which you have not performed, and which I cannot compel you to perform, because it is too late, and the thing cannot now be done: you must not sue me upon this bill of exchange, but you must give it up to be cancelled;" and he gets a decree accordingly. But this Court cannot give *A.* any relief for the loss sustained by reason of the non-performance of the contract, and thereupon he sues *B.* at law for damages for the injury occasioned by the non-performance of the contract. That is not asked by the bill in equity, and it cannot be given in equity, except under *Lord Cairns' Act*. It is a totally distinct proceeding, it is a proceeding simply for damages for breach of the contract, the specific performance of which cannot be obtained.

M. R. 1867 ANGLO-DANUBIAN COMPANY. v. ROGERSON.

Now, what difference does *Lord Cairns' Act* make? I am quite satisfied that *Lord Cairns' Act* was not intended to limit the powers and rights of suitors. The object of it was to extend them, and there was no intention by *Lord Cairns' Act* either to make it compulsory upon this Court to give damages in all cases where there was a suit in equity and damages might be obtained in a Court of law, or to abridge the jurisdiction of the Court of Chancery, or take away the rights which suitors previously enjoyed. The case of *Fennings* v. *Humphery* (1) appears to me to be distinctly in point upon this subject. It appears to me to be reasonable and proper, and an observation of Mr. *Southgate* struck me as being very forcible, when he said that the litigation in the Court of Chancery might be prolonged for a long time, and the *Statute of Limitations* might run, and that when the Court at the end might say, "Now you may proceed and bring your action for damages," the whole six years might have elapsed. Unquestionably that would have been the result, if the suit had been instituted in the time of Lord *Eldon*, when *Lord Cairns' Act* did not exist, and when causes were usually four or five years before they came to be heard after they were set down. Of course that cannot alter the law upon the subject, but it shews very clearly that the statute cannot mean, in a case of this description, to prevent a Plaintiff from proceeding at law to recover damages which he does not ask the Court of Equity to give him, which he cannot be compelled to ask to be ascertained and paid in a suit in equity, and which are in no way dependent on the result of the suit in equity, as they would be if the suit were one for the specific performance of a contract. I am of opinion that the order calling upon the Plaintiffs to elect must be discharged. The costs will follow the event.

Solicitor for the Plaintiffs: Mr. *Devonshire.*
Solicitor for the Defendant: Mr. *Crowdy.*

(1) 4 Beav. 1.

In re NATIONAL SAVINGS BANK ASSOCIATION.

M. R.
1867
May 1.

HEBB'S CASE.

Contract—Company—Shareholder—Acceptance of Shares—Allotment—Application withdrawn before notice of Allotment.

A proposed contract is not binding on the party who proposes it until its acceptance by the other party has been communicated to him or his agent.

H. applied in writing for ten shares in a company, and the directors allotted to him ten shares; after the allotment, but before it was communicated to *H.*, he withdrew his application:—

Held, that he did not agree to accept the shares.

THIS was an application by *Henry Kirke Hebb* that his name might be removed from the list of contributories of the *National Savings Bank Association*, a company formed under the *Joint Stock Companies Act*, 1856, and now being wound up under the *Companies Act*, 1862.

On the 28th of August, 1857, *Hebb* signed and gave to the agent of the company at *Lincoln* an application for ten shares in a form provided by the company, and at the same time paid to the agent a deposit of 5*s.* per share, for which the agent gave him a receipt, with a memorandum that a duly authorized receipt would be forwarded from the head office within eight days.

On the 4th of September, 1857, the directors allotted ten shares to *Hebb*, and entered his name in the allotment book, and on the same day sent to their agent at *Lincoln* the letter of allotment with a receipt for the deposit signed by two directors, but the agent did not deliver the letter and receipt to *Hebb* until the 9th of September. In the meantime, on the 8th of September, *Hebb* wrote a letter to the directors, withdrawing his application, and requesting the return of the deposit.

On the 26th of August, 1858, *Hebb* having insisted upon repudiating the allotment and threatened to sue the company for the deposit, the directors repaid him the deposit. The allotment was not formally cancelled, and *Hebb's* name remained on the register of shareholders, but he had no further communication from the

M. R. 1867 HEBB'S CASE.

company until June, 1866, when the company was ordered to be wound up.

Mr. *De Gex*, Q.C., for the applicant:—

First: the applicant never became a shareholder within the meaning of the *Joint Stock Companies Act*, 1856, s. 19, inasmuch as he never accepted any shares, having withdrawn his application before its acceptance by the directors was communicated to him. A contract is not binding until the party who has made the proposal has received from the other party notice that the latter has accepted it: *Routledge* v. *Grant* (1). So long as the letter of allotment remained in the hands of their agent, the company might have cancelled the allotment, and the applicant could not have compelled them to give him the shares, and, on the other hand, he was entitled to withdraw his application.

[Mr. *Roxburgh*, Q.C., *amicus curiæ*:—In *Pellatt's Case* (2), although there was no decision upon the point, the Lords Justices expressed an opinion that notice of allotment was necessary to complete the contract, and that in *Bloxam's Case* (3) the decision must have been founded on the assumption that *Bloxam* knew of the allotment, though he had no formal notice.]

Secondly: if there was a binding contract, it was annulled when the deposit was returned, and it has been so treated by both parties ever since. It was competent to the company to annul it, and the directors could exercise this power on behalf of the company: *Ex parte Beresford* (4); *Ex parte Miles* (5). Where there is a *bonâ fide* dispute as to the validity of a contract to take shares, the directors may compromise it, or release the alleged shareholder from the contract: *Lord Belhaven's Case* (6). And even if the directors had no such power, the consent of the shareholders would be presumed after the lapse of so many years: *Brotherhood's Case* (7).

(1) 4 Bing. 653.
(2) Law Rep. 2 Ch. 527.
(3) 33 L. J. (Ch.) 519, 574.
(4) 2 Mac. & G. 197.
(5) 34 L. J. (Ch.) 123.
(6) 3 D. J. & S. 41;
(7) 31 Beav. 365; on appeal, 8 Jur. (N. S.) 926.

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Mr. *Baggallay*, Q.C., and Mr. *J. Napier Higgins*, for the official liquidator:—

First: the contract was complete as soon as the shares were allotted. The directors could not, either as against the applicant, or as against the other shareholders, have recalled the allotment, whether or not it had been notified to the applicant, and the applicant might at any time after the 4th of September, 1857, have enforced specific performance. It has never been decided that notice of acceptance is necessary to complete a contract. In *Routledge* v. *Grant* (1) there was no acceptance of the offer; in *Ex parte Miles* (2), before any allotment was made both parties agreed to vary the contract; in *Pellatt's Case* (3) there was no decision on this point. In *Dunlop* v. *Higgins* (4) it was held that a contract was complete as soon as a letter was posted accepting the offer. [They also referred to *Chitty* on Contracts (5).]

Secondly: if the contract was binding, the applicant, having become a shareholder, could only be released by the consent of every shareholder: *Spackman's Case* (6); *Stanhope's Case* (7). In *Lord Belhaven's Case* (8) the deed of settlement expressly empowered the directors to compromise suits, and Lord *Belhaven* paid a sum of money to be released from the alleged contract; here there was no such power, and, in fact, there was no compromise.

LORD ROMILLY, M.R.:—

I think that Mr. *Hebb* is not a contributory of this company. The mere writing of a line in a book is not, in my opinion, an irrevocable act; and if a person applies for shares in a company, and the directors write down his name in the allotment book, they may at any time before the allotment has been communicated to the allottee alter or cancel the allotment; if it were not so, a mere accident might irrevocably bind the company.

These applications for and allotments of shares must be treated upon the same principles as ordinary contracts between individuals.

(1) 4 Bing. 653.
(2) 34 L. J. (Ch.) 123.
(3) Law Rep. 2 Ch. 527.
(4) 1 H. L. C. 381.
(5) Pages 9 *et seq.* (5th ed.)
(6) 11 Jur. (N.S.) 207,
(7) Law Rep. 1 Ch. 161.
(8) 3 D. J. & S. 41.

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If *A.* writes to *B.* a letter offering to buy land of *B.* for a certain sum of money, and *B.* accepts the offer, and sends his servant with a letter containing his acceptance, I apprehend that until *A.* receives the letter, *A.* may withdraw his offer, and *B.* may stop his servant on the road and alter the terms of his acceptance, or withdraw it altogether; he is not bound by communicating the acceptance to his own agent. *Dunlop* v. *Higgins* (1) decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the Post Office is the common agent of both parties. In the present case, if Mr. *Hebb* had authorized the agent of the company to accept the allotment on his behalf, there would have been a binding contract, but he gave no such authority, and as he had withdrawn his original offer before he received the letter of the directors, the position of the parties was changed, and that letter became an offer which required the acceptance of Mr. *Hebb* to constitute a binding contract.

In *Martin* v. *Michell* (2) Sir *T. Plumer* says, "When one party, having entered into a contract that has not been signed by the other, afterwards repents, and refuses to proceed in it, I should have felt great difficulty in saying that he had not a *locus pœnitentiæ*, and was not at liberty to recede until the other had signed, or in some manner made it binding upon himself. How can the contract be complete before it is mutual? And can it be complete as to the one, and not as to the other?" I am of opinion that an offer does not bind the person who makes it until it has been accepted, and its acceptance has been communicated to him or his agent. Consequently, in my opinion, Mr. *Hebb* never became a shareholder; but if he had once become a shareholder, I should have felt a difficulty in holding that he had been released from that position by the subsequent return of the deposit. His name must be removed from the list of contributories, and both he and the official liquidator must have their costs out of the estate.

Solicitors for the Applicant: Messrs. *Gregory, Rowcliffes, & Rawle.*

Solicitors for the Official Liquidator: Messrs. *Lewis, Munns, Nunn, & Longden.*

(1) 1 H. L. C. 381. (2) 2 Jac. & W. 413, 428.

HARVEY *v.* BRADLEY.

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Suit charging wilful Default after Decree—Supplemental Bill in nature of Bill of Review.

Where a bill was filed by a legatee against executors, seeking to charge them with a sum which they might have received but for their wilful default, and an administration decree had already been made in a suit by the executors, to which the present Plaintiff was a party, under which the usual accounts and inquiries were directed:—

Held, that it was a supplemental bill, in the nature of a bill of review, which could not be filed without the leave of the Court.

A Defendant to an administration suit instituted by executors can allege by his answer, and prove by evidence, a case of wilful default against the executors, when the necessary inquiries and directions will be added to the decree, without a cross bill being filed.

THIS was a suit by *Ann Harvey*, the widow of *George Harvey*, deceased, and one of the legatees under the will of *Joseph Harvey*, the testator in the cause, against the executors and the other legatees, seeking to make the executors liable for wilful default in not recovering a certain sum alleged to be due to the testator at the time of his death, and still outstanding.

The testator died in 1844. At the time of his death the sum of £500 was due to him from the said *George Harvey*, of which £250 was secured by the promissory note of *George Harvey*, and the remainder by the joint and several promissory notes of *George Harvey* and three sureties

George Harvey died in May, 1852, and on his death the Plaintiff became entitled to a share under the testator's will.

In 1861, the executors filed a bill in a suit of *Bradley* v. *Harvey*, to which the Plaintiff and the other persons interested under the will were Defendants, for the administration of the estate, under which, in February, 1862, the usual decree was made, and inquiries directed (among other things) whether the said *George Harvey* had paid to the Plaintiffs the said sum of £500.

The present Plaintiff, who had not by her answer in the suit of *Bradley* v. *Harvey* raised any case of wilful default against the executors in respect of the said sum, now alleged by her bill,

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which was filed in February, 1865, that the sum might have been recovered but for the wilful default of the executors; and further, that they had at the hearing of their suit objected to the introduction of any directions into the decree for an inquiry into the circumstances under which the sum had not been paid, though she, by her counsel, proposed that the decree should be taken in that form.

The bill prayed that the suit might, so far as necessary, be taken as supplemental to the suit of *Bradley* v. *Harvey*, and that an account might be taken of all sums which, but for the wilful neglect and default of the executors, might have been received.

The executors denied, by their answer, that they had been guilty of wilful default in respect of the sum in question, of which they could only have recovered a very small part from *George Harvey*, at the time when it became payable. They submitted that the present suit was wholly unnecessary, inasmuch as a decree had already been made for the administration of the testator's estate, with the usual inquiries, in a suit to which the present Plaintiff was a party.

Mr. *De Gex*, Q.C., and Mr. *Schomberg*, Q.C., for the Plaintiff, contended that the executors were guilty of wilful default in not obtaining the sum of £500 secured by the promissory note, for which they might have sued the sureties: *Ansell* v. *Baker* (1).

Mr. *Jessel*, Q.C., and Mr. *Bevir*, for the executors, took a preliminary objection:—

This bill is of the nature of a bill of review, and has been filed without the leave of the Court. In the suit of *Bradley* v. *Harvey*, to which the present Plaintiff was one of the Defendants, the usual decree was made, and full inquiries were directed, including inquiries whether the sum in question was paid. The prayer of this bill is simply to add to the former decree inquiries as to wilful default. It is, therefore, a supplemental bill in the nature of a bill of review. In *Partington* v. *Reynolds* (2), where a decree for the common accounts had been obtained on an administration summons, when a summons was taken out to vary or add to the decree

(1) 15 Q. B. 20. (2) 4 Drew. 253; 4 Jur. N.S. 200

in Chambers, by directing an account for wilful default, Vice-Chancellor *Kindersley* refused to do so, and observed that a Defendant could neither be made liable on a summons nor on a bill for wilful default, when only the usual decree had been made.

In *Hodson* v. *Ball* (1), where a bill, which was in part a supplemental bill in the nature of a bill of review, had been filed without the leave of the Court, it was ordered to be taken off the file. In that case Lord *Lyndhurst* observed, "The decree prayed for in this case is quite contrary to the principle of the original decree. The original decree was merely for a common account. The supplemental bill prays for an account of quite a different nature, founded on the wrongful conduct of the parties; for it calls upon them to account for what they might have received had it not been for their wilful default." These decisions establish that where a bill is filed after decree seeking to charge executors with wilful default, it is inconsistent with the former decree, and can only be filed by leave of the Court.

In *Bainbrigge* v. *Baddeley* (2), a demurrer was allowed to a bill filed, without leave, for relief inconsistent with the relief obtained by the same Plaintiff in a former suit.

Mr. *De Gex*:—

The objection raised by the Defendants to this suit cannot be sustained.

A bill in the nature of a bill of review is only required where the relief sought in the new suit is inconsistent with the decree already made, so that that decree might be pleaded to the new bill. In all the cases cited on the other side, the Plaintiff was the same in both suits. Now a Plaintiff cannot pray relief piecemeal. His suit must be exhaustive, unless he can, as he must on a Petition for leave to file a bill of review, account for it not having been so by shewing the discovery of new facts. The decree being otherwise assumed to be exhaustive, there may be said to be an inconsistency in the same Plaintiff seeking additional relief in a new suit where the actual facts are the same. In any other sense it would be both unjust and absurd to say that a decree for

(1) 1 Ph. 177, 182. (2) 9 Beav. 538.

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an account of what might have been received by Defendants, but for wilful default, is inconsistent with a decree for an account of what they have actually received, or to say that a *cestui que trust*, who could not possibly obtain the former decree in the executor's suit, shall not have the ordinary right of seeking redress without the preliminary leave of the Court. But the requisites which must exist before such a decree can be made have been often prescribed, and are thus stated by Lord Justice *Knight Bruce*, in *Coope* v. *Carter* (1): "Lord *Eldon* often said, that, as a general rule, to obtain such an inquiry against an executor or a trustee, you must allege a case for such an inquiry, must pray for it, and prove one act, at least, of wilful default, and that, doing so, you may have a general decree as to wilful default. That is the course of the Court." This is altogether inapplicable to a Defendant, who cannot, of course, seek any decree, nor compel the Plaintiff to take a decree which he does not wish to take. In the present case, it is proved that the present Plaintiff, who was a Defendant to the first suit, proposed to the Plaintiffs, at the hearing of that suit, to take a decree which would have admitted of an inquiry, and that the Plaintiffs declined to take such a decree.

As to the cases relied upon on the other side, in *Partington* v. *Reynolds* (2) it was the Plaintiff who sought to add to the decree, and the observations already made apply to it. But moreover, the application was to add to the decree in Chambers under the 20th Order of 1852, and it was clearly not within the order or the practice. *Hodson* v. *Ball* (3) was a case, also, where the Plaintiff had taken what he sought to prove was a less beneficial decree than he was entitled to, and where, therefore, the principle already mentioned applied. *Bainbrigge* v. *Baddeley* (4) was reversed on appeal by Lord *Cottenham* (5), and His Lordship's observations are strongly in favour of the Plaintiff in the present case.

Mr. *Shee*, for the other Defendants.

(1) 2 D. M. & G. 292, 297.
(2) 4 Drew. 253.
(3) 1 Ph. 177.
(4) 9 Beav. 538.
(5) 2 Ph. 705.

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LORD ROMILLY, M.R.:—

This is a bill filed by a widow, complaining that the Defendants, the executors of the testator, did not enforce payment of a debt of £500 against the estate of *George Harvey*, contracted some twenty years ago. At the time when it appears by the evidence it was to be paid, he could have paid but a very small portion of it, if anything at all. But then it was said there were three sureties, and the executors might have enforced payment of the debt against the sureties. She complains that they did not do that. Her interest in this matter arose in the month of May, 1852, upon the death of her husband, and the bill is not filed until February, 1865, that is to say, upwards of twelve years afterwards, and then she comes forward to complain that the executors did not enforce this debt at that time, and seeks to charge them with wilful default.

If the matter stood there alone, it is possible that the Court, however reluctantly, would think it was a case for giving relief, if it were clearly proved; and in what I am about to say, I will assume that the case of wilful default is established.

A bill was filed by the executors in November, 1861, to take the accounts of this estate, and a decree was made in February, 1862, directing the accounts to be taken. The present Plaintiff was a Defendant to that suit. It was argued that she could not have brought forward this case in that suit. I dissent from that argument. If it were so, the executors, in instituting a suit for the administration of an estate, could administer only just such portion of it as they thought fit, instead of having a complete and entire administration of the estate. The Defendants, who are parties to such a suit, can, in my opinion, bring forward a case of wilful default against the Plaintiffs. A person interested in the estate of the testator, who is made Defendant to a suit instituted by the executors, may, by his answer, state and prove by evidence a case of wilful default, and when he has done so, the Court will, at the hearing, direct an inquiry as to wilful default. In that case, it is not necessary that the Defendant should file a cross bill, by which, undoubtedly, he might bring forward a charge of wilful default, The Court will never require a Defendant to file a cross bill for the purpose of bringing forward a case of wilful default against an executor who files a bill for the administration of the testator's

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estate; but it will allow the Defendant to allege such a case by his answer, and prove it by evidence, and when that is done it will add the necessary inquiries or directions to the decree.

If that were not so, a suit for the administration of an estate would be unlike any other suit in this Court; for it is unquestionable that the Defendant may, in many cases, where it is germane to the relief sought for by the Plaintiff, introduce matters which would entitle the Defendant to an inquiry in order to establish the case on which he relies. It is true that if he wants separate and independent relief, he must file a cross bill for that purpose; but whenever he is obliged to put in an answer, it is equally true he may bring forward the whole of the case at that time.

The Court must consider that the parties are concluded by the decree that was made, and a suit which is subsequently instituted for the purpose of adding to the decree that was then made must allege circumstances to shew that they could not have brought forward a case of that kind to obtain from the Court any relief. In my opinion, that is the rule, and a wholesome rule, of the Court. In fact, this is a bill in the nature of a bill of review.

In this case it is not pretended that it is proved that the widow was not aware of the whole of the circumstances when she was made a party to the suit of the executors, or that she could not have stated it in an answer filed in that suit, and have brought forward her case at that time. All that she attempts to do is to get something inserted in the decree which, not being raised by the pleadings, the Court refused to insert in the decree, and thereupon, having failed, three years afterwards she files a bill for the purpose of obtaining this relief. I am of opinion that she is not entitled to do that; and I am also of opinion that, having regard to the merits of the case, it is not a case in which the Court will be disposed to treat lightly an objection of that character, even if it could properly be called a technical objection, though it is really an objection which it is essential to raise for the purpose of avoiding litigation, and enabling the Court to deal with the whole of every case which is brought before it. But this is in fact a stale demand, a demand seeking that certain persons, who had become sureties for her husband, ought to have been sued if her husband had not been compelled to pay, which probably

would have had the effect of being very injurious to her and her children, by compelling proceedings against him.

In that state of circumstances, I am of opinion that this is a suit in which I cannot grant the relief asked, and, from the circumstances of the case, I think I must dismiss the bill with costs.

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Solicitors for the Plaintiff: Messrs. *Austen, De Gex, & Harding,* agents for Messrs. *Percy & Co., Nottingham.*

Solicitors for the Defendants: Messrs. *Eyre & Lawson,* agents for Messrs. *M. & H. Browne, Nottingham.*

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Canal—Right to adjacent Support—Mines—Minerals—Compensation.

By a Canal Act the mines and minerals within and under the land through which the canal was to be made were reserved to the owners of the land, and the owners were empowered (subject to the restrictions thereinafter contained) to work and get such mines and minerals, not thereby injuring the navigation or the works; by subsequent sections the owners of mines were prohibited from getting minerals under or within ten yards from the canal without the consent of the proprietors of the canal, who, if they refused to permit the owner of any mines to work such part thereof as should be under or within ten yards from the canal, were required to compensate such owner in the manner provided by the Act:—

Held, that the provisions of the Act as to prohibition of working and compensation extended by implication to workings more than ten yards from the canal, and that the proprietors of the canal were not entitled, by virtue of their common law right to adjacent support, to prevent the lessee of an adjacent quarry, who derived his title from the person who had sold to the proprietors the land on which the canal was made, from working more than ten yards from the canal so as to endanger the safety of the canal, without paying him compensation in the same manner as if the quarry had been within the ten yards; but that, upon paying such compensation, they were entitled to stop the working of any mine which would be injurious to the canal:

Held, also, that the reservation of mines and minerals within and under the land included everything below the surface available for agricultural purposes, which could be made useful for any purpose, and included the right of quarrying as well as underground mining.

THIS was a suit by the *Midland Railway Company* as owners of the *Ashby-de-la-Zouch Canal,* to restrain the working of a stone

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quarry adjoining the canal so as to endanger the safety of the canal.

The canal was made in 1796, under an Act of Parliament (34 Geo. 3, c. 93) which contained the following provisions :—

The 60th section provided that if at any time thereafter any person should sustain any damages in his lands or property by reason of the execution of any of the powers given by the Act, such damages were to be ascertained and paid in the same manner as the damages occasioned by the making of the canal.

The 63rd section provided that nothing contained in the Act should extend to affect the right of any owner of any land in, upon, or through which the canal should be made, to the mines and minerals lying and being within or under the said land, but all such mines and minerals were thereby reserved to such owner, his heirs, &c., and that it should be lawful for such owner, subject to the conditions and restrictions thereinafter mentioned, to work, get, drain, take, and carry away to his own use such mines and minerals "not thereby injuring, prejudicing, or obstructing the said navigation, or the works or conveniences thereof."

The 64th section provided that no owner or proprietor of any mines or minerals, nor his workmen or servants, or other person whomsoever, should open, dig, sink, or carry on any work for the getting of coal, limestone, ironstone, or other minerals, under or within the distance of ten yards from the canal (except as thereinafter mentioned) without the consent of the canal company in writing under their common seal.

The 68th section enacted that when and as often as the owner or worker of any mine lying under or within ten yards from the canal should be desirous of working the same, then, and in every such case, such owner should give notice in writing of such intention to the clerk of the company at least ten days before he should begin or continue to work such mine, the notice to be given after such mine should have been worked to within ten yards of the canal, and upon the receipt of such notice it should be lawful for the company to inspect, or cause such mines to be inspected, in order to determine what coal, ironstone, or other minerals might be come at, and might be actually gotten without prejudice or damage to the canal; and if the company should refuse or neglect to inspect such mine, or

to cause the same to be inspected, within ten days after receipt of such notice, then it should be lawful for the owner or worker of such mine, and he was thereby authorized, to work such part of the mine as might be under the canal or within the distance aforesaid; and if the company should make such inspection, then they should, and were thereby required, within thirty days after such inspection made, to determine whether or not they would permit the owner to work such mine; and if, upon such inspection as aforesaid, the company should refuse to permit the owner of such mine to work any such part thereof as might be under the canal, or within the distance aforesaid, or in any other manner obstruct or prevent such owner from getting the same, then and in such case the company should, within three months after such refusal or obstruction, pay to such owner or worker such price for the same after the like rate as the next adjoining mines of equal quality should have been really and *bonâ fide* sold for, and if any question or dispute should arise between the company and the owner touching the same, such question should be settled and determined by commissioners or a jury in the same manner as the value of land to be purchased for the making the canal.

The land on which that part of the canal which adjoined the quarries in question was made, was purchased by the canal company from the trustees of a charity, who were also the owners of the quarries, the Defendants being their lessees.

In 1846, in pursuance of an Act of Parliament, the canal and all the powers, rights, and privileges of the canal company in relation thereto, were sold to and vested in the Plaintiffs.

In March, 1863, the Defendants, who had not up to that time worked the quarries to within forty yards of the canal, gave notice to the Plaintiffs that they intended to quarry the stone adjoining the canal, and that unless the Plaintiffs compensated them for the stone required to keep the canal secure, they should proceed to get it at the Plaintiffs' risk. The Plaintiffs replied, on the 11th of April, 1863, that they claimed the right of support afforded to their canal by an area of ground specified on a plan which accompanied the letter, extending to about thirty yards from the canal, in its present form, without making any compensation, and that the stone within such area was not a mineral within the meaning of the

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Canal Act, and they threatened to file a bill in Chancery if the Defendants interfered with the soil within the area. The Defendants, in reply, insisted upon their right to get the stone or receive compensation, and they proceeded to work the quarries within the area until the autumn of 1865, when a slip occurred in the embankment of the canal. Thereupon, a further correspondence took place, the Defendants re-asserting their claim to work within the area unless compensated, but offering to desist upon receiving compensation.

The Plaintiffs then filed their bill, praying, first, for an injunction to restrain the Defendants from digging, excavating, or quarrying, any stone, earth, or soil lying within the area referred to by their letter of April, 1863, or within ten yards of the foot of the embankment of the canal, or which was or might be necessary for the support of the embankment and canal, and from doing anything whereby the safety of the canal and works might be endangered; and, secondly, for a declaration that the Defendants were not entitled to any compensation from the Plaintiffs in respect of the value of the land and stone necessary for the support of the Plaintiffs' works.

The stone in question was used for road-making and paving, and lay about thirty feet below the surface of the ground.

An interlocutory injunction had been granted, by consent, upon the Plaintiffs giving the usual undertaking as to damages.

The Defendants, by their answer, denied that the working beyond ten yards would endanger the canal, but they repeated their offer to abstain from working within the area specified by the Plaintiffs upon being compensated.

A good deal of conflicting evidence was produced on the question of probable danger to the canal, but the Defendants, by their counsel at the hearing, offered to submit to a perpetual injunction upon being compensated for the value of the stone.

Mr. *Selwyn*, Q.C., and Mr. *Speed*, for the Plaintiffs:—

The Plaintiffs are entitled to the subjacent and adjacent support from the Defendants' land, which is necessary for the safety of the canal, by virtue of the implied contract, into which the vendors of the land upon which the canal is made, from whom the Defendants

derive their title, entered by their conveyance of the land for the purpose of making the canal, and also by reason of the uninterrupted enjoyment of such support for more than sixty years. A compulsory conveyance of land under an Act of Parliament for the purpose of a railway or canal carries with it the right to support necessary for that purpose, just as much as a voluntary conveyance, except so far as the right is expressly qualified by the Act: *Caledonian Railway Company* v. *Sprot* (1); *North Eastern Railway Company* v. *Elliot* (2). No such qualification is to be found in this Canal Act. The 63rd section expressly recognises the right to subjacent support by prohibiting the owners of the reserved mines and minerals from working so as to injure, prejudice, or obstruct the navigation; the 64th gives the company, in addition to their common law right, the right of entirely prohibiting the working of mines under or within ten yards of the canal; the 68th section, upon which the Defendants will rely, applies exclusively to mines and minerals under or within ten yards of the canal, of which the company are empowered to prohibit the working without proving that it will injure the canal; but there is no section in the Act which touches the right to adjacent support from land more than ten yards from the canal, or requires the company to give compensation for such right. In *Elliot* v. *North Eastern Railway Company* (3), where the Act of Parliament contained a clause similar to the 68th section of this Canal Act, the distinction was recognised between the right to lateral support from land beyond the area within which the company was authorized to prohibit the working on purchasing the minerals, and the right to subjacent and adjacent support from the land within that area. If the working beyond ten yards will not endanger the safety of the canal, the Defendants will not be injured by the injunction. The compensation for future damage to owners of land by reason of the execution of the powers of the Act, provided for by the 60th section, does not include compensation for a right which was necessarily implied in the conveyance of the land to the canal company, and which must therefore have been taken into account in estimating the price to be paid by the company for the land: *Caledonian Railway Company* v. *Sprot*.

(1) 2 Macq. 449; (2) 1 J. & H. 145; 2 D. F. & J. 423;
(3) 10 H. L. C. 333;

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But even as regards the working within ten yards of the canal, the Defendants cannot claim compensation. Stone which is used only for making roads does not come within the reservation of mines and minerals in the Act, and, at all events, that reservation does not entitle the owner to work open quarries: *Bell* v. *Wilson* (1).

LORD ROMILLY, M.R.:—My present impression is strongly in favour of the Defendants upon the construction of the Act; and, as I understand that they do not resist the injunction, but only raise the question of compensation, I will take time to consider whether I need hear their counsel.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for the Defendants, referred the Court to the following authorities:—*Wyrley Canal Company* v. *Bradley* (2); *Fletcher* v. *Great Western Railway Company* (3); *Bagnall* v. *London and North Western Railway Company* (4); *Dudley Canal Company* v. *Grazebrook* (5); *Stourbridge Canal Company* v. *Earl Dudley* (6); *Birmingham Canal Company* v. *Earl Dudley* (7).

March 11. LORD ROMILLY, M.R.:—

In this case I am of opinion that the Plaintiffs fail in their principal contention. The Plaintiffs bought the *Ashby-de-la-Zouch Canal*, and they stand in exactly the same situation as the canal company. The Defendants are the owners of some of the soil through which the canal passes, and the Defendants want to quarry and carry away stone from a place which is mentioned by the Plaintiffs in the prayer of the bill, whereby it is stated, and, in my opinion, proved, that the safety of the canal will be endangered. The only question to be tried in this case is, whether the Defendants are entitled to any compensation, because, in my opinion, there is no question but that the Plaintiffs are entitled to the in-

(1) 2 Dr. & Sm. 395; Law Rep. 1 Ch. 303.
(2) 7 East, 368.
(3) 4 H. & N. 242; 5 H. & N. 689.
(4) 7 H. & N. 423.
(5) 1 B. & Ad. 59.
(6) 30 L. J. (Q.B.) 108;
(7) 7 H. & N. 969.

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junction. The whole matter is regulated by the statute of the 34 Geo. 3.

Two questions are raised by the Plaintiffs. In the first place they say that the stone is not mineral within the words of the Act of Parliament; and in the second place, they say that, if it be, still there was an implied contract, when the land was bought by the canal company, that the owner should give to the company all the adjacent and subjacent support necessary for the maintenance of the canal. Upon the first point I think there is no question. Stone is, in my opinion, clearly a mineral; and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fire-clay, or the like, comes within the word mineral, when there is a reservation of the mines and minerals from a grant of land; every species of stone, whether marble, limestone, or ironstone, comes, in my opinion, within the same category. I think also that no question can be raised here about the exact meaning of the word "mines," which was discussed in the case of *Bell* v. *Wilson* (1). I do not think the question arises within the words of the Act. The words of the Act are to be found in the 63rd section, where the right is reserved. They are "all mines and minerals lying and being within or under the said lands or grounds." In my opinion that includes every species of mineral which is *within* the land, as distinguished from *under* it, and clearly includes quarrying as well as mining, using both of those words in their special sense.

The real question is, whether there is to be compensation. Now the statute is, in my opinion, precise on the right to the minerals being in the owner:—[His Lordship read the 63rd section.] There is here a distinct reservation of the minerals, and of a power to work them, not thereby injuring the navigation. The effect of those last words I will mention presently. The 64th section contains a proviso that "no owner or proprietor of any mines or minerals, nor his workmen or servants, or other person whomsoever, shall on any account open, dig, sink, or carry on any work for the getting of coal, limestone, ironstone, or other minerals, under or within the distance of ten yards from the

(1) 2 Dr. & Sm. 395; Law Rep. 1 Ch. 303.

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canal (except as thereinafter mentioned), without the consent of the canal company in writing, under their common seal, for that purpose, first had and obtained." The 67th clause enables the company to enter and secure the canal, if the mines are worked contrary to the directions of the Act; but the most important section, and that on which this question principally turns, is the 68th. [His Lordship read the 68th section.]

Now, therefore, this section clearly provides that if the canal company prohibit the working of the mines within ten yards, or under the canal, they must pay the owner for those minerals; but here the injury is created by working at a distance from the canal greater than ten yards, and it is contended that this is not included in the Act of Parliament, but is included in the implied contract, and that the mines must not be worked so as to do injury to the canal, as specified in the 63rd section; and the cases of the *Caledonian Railway Company* v. *Sprot* (1), and *Elliot* v. *North Eastern Railway Company* (2), were cited as authorities for that purpose. But in my opinion they have no application to this case; those were not cases of compensation; in both of those cases it was a question of injunction only, and it is clear the railway company or the canal company is entitled to an injunction to prevent the injury to their canal or railway. The only question here is the compensation; it cannot be disputed, after the correspondence, that this was the sole question in discussion, and that if the Plaintiffs had agreed to pay for the value of the stone, they might have stopped the working at any time; due notice was given to the Plaintiffs, and the contest has been throughout upon the question of compensation.

Upon looking at the Act carefully, the assumption of the Act appears to me to be, that beyond ten yards from the canal the working of mines and minerals would do no injury to the canal, but it appears to me to be absurd to say, that if the company stop the working within ten yards of the canal, or under the canal, they must pay the owner, but if they stop the working beyond the ten yards, though they are entitled to stop the working, they are not bound to pay the owner. It is argued, that the implied contract gives necessary support, and that beyond the ten yards the Defendants are not to have compensation. My opinion is, that the

(1) 2 Macq. 449, 2 Jur. N.S. 623. (2) 10 H. L. C. 333, 9 Jur. N.S. 1555.

company can stop all dangerous working at any time they think fit, and that they are the sole judges of when the working becomes dangerous, provided they act within reasonable limits (of course they could not stop it a mile off), but whenever they stop it they are bound to pay compensation. All that is provided for by the previous clause is, that they are to pay the value of the land taken; but the principle that they are to be allowed to prevent the owner from working minerals to the injury of the canal, involves in it this also, that they must pay compensation to the owner for the minerals which they do not allow him to take.

If I required any authority for this, which appears to me perfectly plain upon the construction of the Act, and correctly defined by it, it would be clearly established by the cases to which I was referred by Mr. *Jessel;* there are many which I have looked at, but there are only two which I think it necessary to refer to in any detail. The most pointed of them is the case of the *Wyrley Canal Company* v. *Bradley* (1), which is the more important, because it takes the distinction between a canal company purchasing under the provisions of an Act of Parliament, and a grant of land. The marginal note is to this effect:—"A Canal Act provided that the canal company should not be entitled on purchasing lands for making a canal to any coal mines under the same, but that such mines should belong to the same persons as would have been entitled to them if the Act had not been made, but it required the owners to give notice to the company of their intention to work their mines within ten yards of the canal, and that the company might inspect the mines, and might stop the further working of them, paying compensation to the owners: and it was held that the right of the owners to work within the ten yards was left as before the Act, if after notice given by them to the company the latter did not purchase out their rights, and that the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal owner for such injury, which happened by the default of the company in not purchasing: *aliter*, where the house of one claiming under a grant from the owner of the soil was undermined." The Court there drew the exact distinction between the two cases; one is regulated by

(1) 7 East, 368.

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the Act of Parliament, which provides what shall be done in these cases, but with respect to the sale of a house, there the person who sells the house enters into a warranty that he will do nothing to injure or undermine that house. There are several other cases to which I might refer; one is the case of *Bagnall* v. *London and North-Western Railway Company* (1); that was the case of damage done by water, and it was decided there that damages could be recovered in an action against the company, and that it did not come within the *Railways* and *Lands Clauses Consolidation Acts*. In the case of *Birmingham Canal Company* v. *Earl Dudley* (2), where there was a prohibition to work within twenty yards of a tunnel, and twelve yards of the canal, and a direction that the company were to buy the minerals within the twelve yards from the canal, it was held to apply exactly in the same manner to the tunnel (though it was not mentioned), and that they must pay for the value of the minerals, the working of which they stopped. In the case of *Birmingham Canal Company* v. *Swindell* (3), which was a decision of Sir *W. P. Wood*, with the assistance of Mr. Justice *Crompton*, the decision was to the same effect. The case of *Stourbridge Canal Company* v. *Earl Dudley* (4), to the same effect, decided that no action lies against the owner if the company have neglected to buy the soil. One of the strongest cases is *Dudley Canal Company* v. *Grazebrook* (5); there the Act prohibited working within ten yards, and if the owners wished to work under the canal, or within the distance, they were to give notice to inspect, and if the company omitted to take the lands they were to pay the value of them, and it was also provided, that the mines were to be so worked as that no injury whatever should be done to the navigation, which is exactly the same clause as here; the notice was given, and the company did not take the lands; the working took place, and produced damage to the canal; the Court held that the words of the Act meant extraordinary or unnecessary damage, and as the company did not think fit to take the land, the damage which was produced by the proper working of the mines was damage for which the canal company could

(1) 7 H. & N. 423.
(2) Ibid. 969.
(3) 7 H. & N. 980, n.
(4) 30 L. J. (Q.B.) 108.
(5) 1 B. & Ad. 59.

have no action. I think all these Acts are framed on the same principle, and according to the cases they seem to be exactly the same as this *Ashby-de-la-Zouch Canal Act.*

Then I have to consider what species of decree ought to be made in this case. In the first place I think the company are entitled to an injunction, but I shall begin by making a declaration that the company are entitled to stop the working of the mines wherever they may be injurious to the working of the canal, but that they are bound to pay compensation for such minerals, and that the value thereof is to be ascertained in the manner provided by the 68th section of the Act; then I shall grant an injunction in the terms of the first paragraph of the prayer of the bill, the Plaintiffs undertaking to pay such compensation when the amount thereof shall have been ascertained, and also to afford all proper facilities for the ascertainment thereof; and then, as the contest has been occasioned by the contention of the Plaintiffs that they are not liable to pay compensation, and by that only, they must pay the costs of the suit up to and including the hearing. I presume, though the Plaintiffs may think fit to take the opinion of another Court, they will not refuse to give the undertaking to pay the compensation; if they should refuse, then I shall dispose of it in this way, I shall dismiss the bill with costs, on the Defendants undertaking not to work the mines until the Plaintiffs have had full time for an appeal, or until the Defendants, if they shall be so advised, have ascertained whether any remedy will lie for them in the common law Courts, to compel the Plaintiffs to ascertain the value of the minerals.

Solicitors for the Plaintiffs: Messrs. *Hayes, Twisden, Parker, & Co.*, agents for Messrs. *Berridge & Morris, Leicester.*

Solicitor for the Defendants: Mr. *W. H. Duignan*, agent for Messrs. *Duignan, Lewis, & Lewis, Walsall.*

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1867

March 12, 14.

LISTER *v.* HODGSON.

Voluntary Settlement—Incomplete Trust—Rectification of Settlement—Cancellation of Deed—Refunding.

Where a sum of money was, without valuable consideration, placed in the hands of a trustee, to be held upon certain trusts then declared; and it was agreed that the transaction should be ratified and completed by the execution of a deed, and a deed was afterwards prepared and executed, which was wholly inconsistent with the trusts declared by parol; the Court ordered such deed to be delivered up and cancelled, and the money repaid to the settlor, who had executed the deed in ignorance of its legal effect.

The circumstances under which a voluntary settlement may be rectified, considered.

THE Plaintiff, being entitled to a moiety of certain real estate in *Yorkshire,* sold the same in the beginning of 1865 for the sum of £1000; and, on the 2nd of April, 1865, he received from the purchaser a cheque for the purchase-money. The Plaintiff handed the cheque to the Defendant *Hodgson,* who went with the Plaintiff to the bank and obtained payment of it, and, at the Plaintiff's request, paid £100, part of the £1000, to Mrs. *Dixon,* a sister of the Plaintiff. The remaining £900 was retained by *Hodgson* in his own possession, and formed the subject of controversy in the present suit.

According to the Plaintiff, the sum of £900 was lent to *Hodgson* upon the terms of his paying interest thereon at the rate of £4 10*s.* per cent. so long as the principal remained unpaid. *Hodgson,* on the other hand, alleged that the Plaintiff requested him to invest the £900 in his own name, at £4 10*s.* per cent. interest; to pay such interest to the Plaintiff during his life, and at his death to pay £400 to Mrs. *Dixon,* and £500 to the wife of *Hodgson,* who was another sister of the Plaintiff's: and he further stated that he believed that the Plaintiff made such request from a desire to have the money secured to him for his own life, and for the benefit of his sisters after his death. The following account of the directions given by the Plaintiff to the Defendant was contained in the affidavit of *John Blenkin,* a nephew of the Plaintiff, and son-in-law of *Hodgson,* who was present when the cheque was

handed to the Defendant: "The Plaintiff said to the Defendant, *James Hodgson*, that he was to take the money and invest it in anything that was safe, and pay him interest for it as long as he lived, and at his (the Plaintiff's) death, it was to be divided between his (the Plaintiff's) two sisters, Mrs. *Hodgson* and Mrs. *Dixon*, and that a deed should be made to make the arrangement fast, to which the said *James Hodgson* agreed." Reliance was placed by the Court on this account of the transaction.

The Plaintiff appeared to have afterwards expressed a desire that a deed should be executed for the purpose of securing the property; and *Hodgson* caused a deed poll to be prepared, whereby, in consideration of the annual sum of £40 10*s.* to be paid to the Plaintiff during his life by *Hodgson*, and of the sum of £400 to be paid by *Hodgson* upon the decease of the Plaintiff to Mrs. *Dixon*, the Plaintiff purported to assign the £900 to *Hodgson* absolutely. This deed was executed by the Plaintiff in July, 1865, while he was visiting at *Hodgson's* house. It was admitted that the deed was read over to the Plaintiff previously to his execution thereof; but he had not the assistance of any professional adviser in the matter; and he alleged that, having received only an imperfect education, and being ignorant of the nature of legal documents, he executed the deed in the belief that it was a will or other instrument of a nature which did not deprive him of full dominion over the property.

In November, 1865, the Plaintiff applied to *Hodgson* to repay him the sum of £220, part of the £900, in order to pay for some houses which he had bought. *Hodgson* refused to do so, on the ground that he had no power to advance the money. The Plaintiff then instructed his solicitors to claim the whole £900 from *Hodgson*, whose solicitors replied to the application that the Plaintiff had executed a deed of gift of that sum to *Hodgson*. The Plaintiff then filed his bill, praying that the deed of gift might be set aside and delivered up to be cancelled; and that *Hodgson* might be decreed to repay to the Plaintiff the sum of £900, with interest at the rate of 4½ per cent. Mrs. *Dixon* and Mrs. *Hodgson* were made parties to the suit by amendment.

The cause now came on to be heard.

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Mr. *Selwyn*, Q.C., and Mr. *Martineau*, for the Plaintiff, contended that the deed poll was either a purchase deed or a deed of gift; in either case its nature was wholly inconsistent with the trust set up by the Defendant *Hodgson*.

The circumstances of the case shewed that undue pressure had been brought to bear on the Plaintiff in order to induce him to execute the deed; and the transaction, therefore, could not stand.

Mr. *F. P. Morris*, for Mrs. *Dixon*.

Mr. *Pearson*, Q.C., and Mr. *Cracknall*, for Mr. and Mrs. *Hodgson*:—

A valid parol trust was created of this fund, when it was handed to the Defendant *Hodgson*: *Bridge* v. *Bridge* (1); *Peckham* v. *Taylor* (2). The money, therefore, cannot be repaid to the Plaintiff; and if the deed poll is inconsistent with the intentions of the Plaintiff it may be reformed.

LORD ROMILLY, M.R.:—

It is not necessary for me to hear a reply unless I find, on reading the papers, that it is desirable to do so. I will now state how the case at present strikes me. The rules which govern the dealing with voluntary instruments, when they come before the consideration of the Court, have been frequently declared; nor is there much doubt on the subject. It is quite settled that any man may make a voluntary settlement, if he pleases, either by way of gift, or in the shape of a trust to be executed by persons to whom he conveys property. Whether it be a gift, or a mere conveyance upon trust, it is necessary to have it proved that the man understood what it was he intended to do; and that no undue influence was exercised over him by the person in whose favour he made the instrument. The present transaction does appear to me not to be a very difficult one to understand, and I do not think at present, although, when I come to read the evidence, my opinion may possibly be somewhat altered, that there is much conflict between the parties as to what was intended to be done. The Plaintiff having received a cheque, said he wished it to be intrusted to the

(1) 16 Beav. 315. (2) 31 Beav. 250.

Defendant; the Defendant took it, and they together got the money, and the Plaintiff gave £100 of it to one sister, and the remaining £900 to the Defendant, his other sister's husband. It is clear that when the Plaintiff gave the Defendant that £900 it was not meant to be a gift; and it is not the case, on either side, that it was meant to be a gift. The Plaintiff says he lent it; and although in argument some objection has been made to the word "loan," I do not know that that was inaccurate; for if it was intrusted to the Defendant for a particular purpose until a trust deed could be prepared and executed, it was very much in the nature of a loan, and an action for money had and received would have lain. That took place in April. Then I think it is established that the Plaintiff was very desirous to have a deed executed, and that he went to *Hodgson's* house in July for that purpose; and my belief is, that he intended a deed of trust to be executed, which would be what we should call a declaration of trust of the £900, that is, that the money was to be invested from time to time, and the interest paid to him, and after his death the money was to be divided in the proportion of £400 and £500 between his two sisters. But if those were his intentions they have not been carried into execution. The deed which has been prepared is simply a deed of gift, with the condition that the Defendant should pay $4\frac{1}{2}$ per cent. on the money given to him, and after his death should pay £400 to the sister of the donor. It is a mere deed of gift. What ought to have been done, and what I presume would have been done if proper instructions had been given to the solicitor, is this, to have prepared, not a deed poll by the Plaintiff, but one by the Defendant, declaring that the money had been given to him in trust to invest it from time to time, to pay the interest to the Plaintiff, and after the Plaintiff's death to divide it as I have stated. Accordingly when Mr. *Selwyn* was opening the case, I asked him whether his client would consent to do that now, thinking that would be the best for all parties; but at the same time I stated the Court had no power to compel him to do that, and that it was entirely optional on his part. Why I made that remark I will now explain in a few words. What I consider to be established by the cases is this, that if a voluntary deed is incomplete, this Court will not compel the completion of the imperfect

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instrument; nor, on the other hand, will the Court help a person who has made a gift by a voluntary deed, and then repudiates it, and asks the Court to set it aside, and to give him back the money. The Court says, "It will have nothing to do with it. If you can bring your action at law, do so; but this Court will not interfere in any respect whatever."

Then, supposing this to be a voluntary deed, it is admitted that it does not carry out the intentions of the Plaintiff; but it is said you may reform it. But there is this distinction to be taken. If a man executes a voluntary deed in his lifetime declaring certain trusts, and happens to die, and it is afterwards proved, from the instructions or otherwise, that beyond all doubt the deed was not prepared in the exact manner which he intended, then the deed may be reformed, and those particular provisions necessary to carry his intention into effect may be introduced. But if the case be that he made a mistake, and you say to him, "You intended there should be a trust in favour of *A. B.*," and he says, "I intended no such thing; I do not choose to give anything to *A. B.*," no amount of evidence, however conclusive, proving that he did so intend, will at all justify the Court in compelling him to introduce a clause into the deed which he does not choose to introduce now, although he might at the time have wished to have done so. It comes to this: that the Court will never interfere to enforce a contract between parties for the due execution of a voluntary deed. I cannot decree specific performance of a contract to create a trust which, if the Plaintiff originally intended, he has since repented of. Such a contract or agreement cannot be carried into execution unless there be what is technically called a valuable consideration for it.

The case was put with considerable ingenuity and force in this way: Suppose the case had rested here, that the Plaintiff had given the £900 to the Defendant, and at the same time had told the Defendant, "Now remember, you hold this money upon trust to invest it and to pay the interest to me, and then to divide it after my death between my two sisters in certain proportions;" would not that be complete? I am disposed to think, if nothing more was intended to be done, it would be complete, and that the money being paid, the Defendant would have held it on those trusts, and that the Court would have supported it. But that is

not this case. The arrangement was intended to be ratified and completed by a deed, and accordingly a deed is prepared; when the deed is produced, you find it is not a deed declaring any trust at all, but is a deed giving the money absolutely to the Defendant for his own use and benefit, provided he pays 4½ per cent. to the Plaintiff, and £400 to one of his sisters after his death. This is not the case of a parol trust. The trust was to be put into writing; and it is certain that the writing, if it can be called a declaration of trust, does not carry into effect any such trust as is alleged.

If I simply left this case as it stands, and dismissed the bill, then of course Mr. *Hodgson* might put the money into his own pocket, and do what he pleased with it, for, as I have already explained, I cannot reform this instrument; nor can I, by any possible rule of construction, make out any trust upon this instrument, except a trust to pay interest at 4½ per cent. to the Plaintiff, and £400 to this lady, leaving the money unsecured, although it is admitted that one object of the Plaintiff was to have it secured.

Again, it is clear that the Plaintiff has been compelled to come into Court, because when the request was made to the Defendant to pay £220 he refused to do so, on the ground that he had no power to do it. But the Defendant might have offered to advance the money if the houses were conveyed to him on the trusts intended. Then, when his solicitors are applied to, they state that the deed is a deed of gift, and it is not till the answer comes in that the Defendant sets up a trust.

I am asked to discredit the whole of the Plaintiff's case, first, because he calls it a loan (which I have already disposed of), and secondly, because he says the instrument was a will. But if he really believed it was the mode in which he was disposing of his property after his death, the impropriety of the expression is not very great; and if, in fact, it had been such a declaration of trust as he seems to have contemplated at the time, it would have been a disposition of the £900 after his death. It is difficult, in this state of circumstances, to say the Court can do otherwise than declare that the Plaintiff is entitled to have the money returned to him. Although it be true the Court will not interfere on either side in voluntary transactions, yet when it makes out that the

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deed cannot stand as a deed of gift, and that, therefore, the result would be that there would be simply in the hands of the Defendant a sum of money which the Plaintiff was entitled to, the Court, in order to avoid circuity of action, will, on putting an end to and cancelling a deed, instead of requiring the Plaintiff to bring an action at law for payment of the money, direct the Defendant to pay the money to the Plaintiff.

That is the view which I have taken on the argument, but I may change it on reading the evidence and the pleadings in the cause, and therefore I shall have it put in the paper to-morrow or the next day, in order that, if I wish to have further assistance on the subject, I may hear Mr. *Selwyn* upon it.

March 14. LORD ROMILLY, M.R.:—

I expressed my opinion on this case pretty fully upon the former occasion: I have since read the papers and evidence, and the perusal of them does not alter my view.

The question really comes to this: Can I enforce specific performance of an intention to make a voluntary settlement? I am of opinion that I cannot, and I must, therefore, make a decree according to the prayer of the bill.

The perusal of the papers confirms my view that the Plaintiff, in giving this money to the Defendant, never intended that he should have it beneficially; but that it should be secured. I think his desire to have a deed executed arose from the wish to have it secured. The money has never been secured; and though I have great doubts whether the Defendant clearly understood that it was to be secured, I think he must pay the costs, for this reason, that when the money was asked for, he did not say that he held it on trust; but seems to have claimed it as a gift.

Solicitors for the Plaintiff: Messrs. *Cunliffe & Beaumont*, agents for Mr. *O. B. Wooler, Darlington.*

Solicitors for the Defendant: Messrs. *N. C. & C. Milne*, agents for Messrs. *Swarbreck & Son, Thirsk.*

WALPOLE *v.* APTHORP.

M. R.

1867

March 8, 15.

Will—Legacy, residuary or specific—Abatement.

A testator bequeathed the money to be received under a policy of assurance on his life, which, at the date of the bequest, would have amounted to £6416, to trustees upon trust to invest it in Government securities, and pay the income to his wife for life; and, after her death, to pay thereout two sums of £2000, which he had agreed to settle on his daughters; and he gave £1000, part of the residue of the money, to *A.*; £1000 to *B.*; and "£416, residue and remainder of the moneys to be received under the said policy, after payment of the said four several sums of £2000, £2000, £1000, and £1000, with any future additions that may be made on the said policy," to *C.* £6532 was received under the policy, and invested in Reduced 3 per Cents, at 94. At the death of the widow the price of the stock had fallen to 89:—

Held, that the legacy to *C.* was a specific legacy of £532; and, consequently, that the legacies to *A.*, *B.*, and *C.*, must abate rateably.

THIS was a special case.

Frederick Apthorp, on the marriage of his daughters, *Susan Fereday* and *Caroline Watts*, settled £2000 out of the money to be received under a policy of assurance on his life in the *Equitable Life Assurance Society* upon each daughter, and her children, subject to a life interest reserved to his wife. By his will, dated the 11th of September, 1846, he bequeathed the money to be received under the policy to two trustees (who were also the trustees of Mrs. *Watts's* settlement) upon trust to invest the same in Government securities, and pay the income to his wife for life, and after her death, by sale of a sufficient part of the securities, to raise and pay the two sums of £2000; and he gave the residue of the moneys, stocks, funds, and securities, to be produced from the policy, from and after his wife's death, to his five daughters.

By a codicil, dated the 6th of February, 1850, the testator, after reciting the above bequest, and stating that the sum of money which would be then payable under the policy amounted to £6416 10*s.*, revoked the bequest of the residue of the moneys to be produced from the policy to his five daughters, and gave such residue in manner following (that is to say), £1000 part thereof to Mrs. *Watts*, £1000 other part thereof to trustees for the

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benefit of Mrs. *Fereday* and her children; and "as to £416 10*s.*, the residue and remainder of the moneys to be received and to be produced under and by virtue of the said policy, after payment of the said four several sums of £2000, £2000, £1000, and £1000, with any future addition or additions that may be made on the said policy," upon trust for all the daughters of his son, *W. H. Apthorp*, who should attain twenty-one.

The testator died in August, 1853; the sum received upon the policy was £6532 10*s.*, which was invested by the trustees in Reduced 3 per Cents., at 94⅝. The widow died in June, 1865, at which time the price of Reduced 3 per Cents. had fallen to 89¼.

W. H. Apthorp had only one daughter, *Lucy*, and she had attained twenty-one. After the testator's death Mr. *Watts* died, and Mrs. *Watts* married *R. Walpole*, and her legacy of £1000 was thereupon settled in the usual manner. Mrs. *Fereday* and her children were living abroad, and were not made parties to the special case.

The questions were:—

1st. Whether Mrs. *Walpole* and her children could claim £2000, or only so much of the Reduced 3 per Cents. as would have been purchased with £2000 at the testator's death.

2nd. Whether, as the moneys to be produced by the sale of the stock would be insufficient, after payment of the two sums of £2000, to pay in full the legacies of £1000, £1000, and £532 10*s.*, such legacies ought to abate proportionately, or whether the two legacies of £1000 should take priority over the legacy of £532 10*s.*

Mr. *Eddis*, for Mrs. *Walpole* and her children:—

1st. The will expressly directs the trustees to raise the two sums of £2000 by sale of a sufficient portion of the stock after the widow's death; it is impossible, therefore, for the legatees to contend that these sums ought to have been severed from the rest of the fund at the testator's death. 2nd. The gift to the daughters of *W. H. Apthorp* was residuary. It is not like the cases of *Page* v. *Leapingwell* (1), and *Elwes* v. *Causton* (2), where a testator was dividing what he assumed to be a fixed sum; here the testator's language shews that he knew that he was dealing with a fluc-

(1) 18 Ves. 463. (2) 30 Beav. 554.

tuating fund; for after stating its present value, and specifying £416 10s. as the amount of the residue, according to that value, after paying the two debts and the two legacies of £1000, he sweeps into that residue the future additions to the fund, shewing that while the other legacies were to be certain, this residuary bequest was to depend on the amount of the fund at the time of distribution.

Mr. *R. R. Hawkins*, for *Lucy Apthorp* :—

1st. It was the duty of the trustees to invest £2000 in their names as the trustees of Mrs. *Walpole's* first settlement, the first trust of which was for the testator's widow for life; and it must be assumed that they did so invest it, and appropriate so much of the stock as was bought with that sum, although, being also trustees of the rest of the fund under the will, they did not actually sever it.

2nd. The gift to *Lucy Apthorp* was, as in *Page* v. *Leapingwell* (1), a legacy of a certain sum, viz., £416 10s., with a chance of increase. If Mrs. *Walpole* had died without issue in the testator's lifetime, *Lucy Apthorp* could not have claimed the £1000 as residuary legatee: *Easum* v. *Appleford* (2). She therefore took a specific legacy of £532 10s., and the three legacies must abate rateably.

Mr. *Cookson*, for the trustees.

Mr. *Eddis*, in reply.

March 15. LORD ROMILLY, M.R. :—

In the first place I am clearly of opinion that the two sums of £2000 are payable in full. The testator settled them on his daughters upon their marriages, and they must be paid without any deduction. Then, as to the three legacies, I think that the case comes within the principle of *Page* v. *Leapingwell*, and that they must abate rateably. If the bequest had ended with the words "residue and remainder of the moneys to be produced under and by virtue of the said policy," there could have been no ques-

(1) 18 Ves. 463. (2) 5 My. & Cr. 56.

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tion but that the testator intended to make an exact division of the fund between the three legatees or classes of legatees. I hesitated at first on account of the subsequent words, but I am of opinion that they do not alter the character of the bequest, and that the testator meant to give to the daughters of *W. H. Apthorp* (to use the words of Sir *William Grant* in *Page* v. *Leapingwell* (1)), not an indefinite surplus, but a precise legacy to a certain extent, with a chance of something more. I am, therefore, of opinion that, after payment of the two sums of £2000, the fund is divisible in the proportions of £1000, £1000, and £532 10*s*.

Solicitors: Messrs. *Pownall & Son.*

M. R. 1867 *Feb.* 11; *March* 21

STARES *v.* PENTON.

Will—Gift of Residue to Children—Hotchpot—Property derived aliunde—Period of Distribution.

A testator, who had been twice married, and had three sons by the first marriage, and a son and a daughter by the second, gave his residuary estate to his five children, share and share alike, the shares of his sons to be payable at twenty-one, and of his daughter at that age or upon marriage, with a gift over in case of death before the shares became payable; and he directed that in case his three children by his first wife should receive any moneys which should become payable to them as the children of their mother, such moneys should be considered as a deduction from the shares of such children, it being his desire that all his children should share and share alike. After the eldest child attained twenty-one, but before any of the rest attained that age, the children of the first marriage became entitled to a fund as children of their mother:—

Held, that, as the share of this fund coming to the eldest son could not be deducted from his share of the residue, and it was the intention of the testator that the proviso in his will should operate on all the children alike, no deduction could be made from the shares of the other children of the said marriage.

THE testator in this cause, *Charles Stares*, was twice married. By his first wife he had three sons, *William*, *Walter*, and *Henry*; and by his second wife he had two children, *Charles* and *Mary Ann*. By his will, dated the 19th of December, 1853, he gave all his

(1) 18 Ves. 463.

residuary estate to trustees upon trust for his wife during her widowhood; and from and after her decease, or second marriage, for his several children (naming them), for their full and equal use and benefit, share and share alike: the share of his sons to be paid to them on their attaining the age of twenty-one years, and the share of his daughter to be paid to her on attaining that age, or her day of marriage, which should first happen; and in case either of his said five children should die before his or her share or portion under that his will should become payable, leaving lawful issue him or her surviving, he directed that such issue should be entitled to such share or portion under that his will as his or her parent would have been entitled to had he or she been living when the same should become payable; but in case of the death of either of the said five children before his or her portion should become payable, without leaving lawful issue him or her surviving, then he directed that the portion or share under that his will of him or her so dying should belong to, and be equally divided between, the survivors and survivor of them his said five children. Provided always, and he expressly directed, that in case his said three sons by his first wife, or either of them, should receive any moneys or property from any relative of his said first wife, or which should become payable to them as the children of their said mother, such moneys, or the value of such property, should be considered as a deduction from the portion to which such sons or son would otherwise be entitled under that his will; it being his express desire and intention that all his children should share and share alike.

The testator died on the 4th of December, 1853. His widow married again in 1861. *William*, his eldest son, attained the age of twenty-one in January, 1866; *Walter*, the second son, attained that age in January, 1867; the other children were still infants.

By a settlement, made in 1837, by *James Grant*, father of the testator's first wife, a sum of £1300 was settled upon trusts for *Mary Grant*, the wife of *James Grant*, for her life, and after her death for the three youngest children of *James Grant* (of whom the testator's first wife was one), in equal shares; and it was provided, that in case any of such children should die before his or her share became payable leaving issue, the same should go to

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such issue. *Mary Grant* died in November, 1866; and upon her death the three sons of the testator by his first marriage became entitled to one-third of the £1300 so settled.

A Petition was now presented by the three sons of the first marriage, that the shares of *William* and *Walter* in the residue might be ascertained and paid to them, and that the shares of the infants might be carried to a separate account.

Mr. *Selwyn*, Q.C., and Mr. *W. Morris*, for the Petitioners:—

No deduction ought to be made from the Petitioners' shares because they have become entitled to one-third of £1300 under the settlement of 1837. This sum does not come to them as children of their mother. Besides, the proviso in the will is void, on account of its extending to property derived from an unlimited class of persons; or, if any meaning is to be given to it, it must refer only to property acquired before the shares became vested.

Mr. *Ward*, for the younger children:—

The share of £1300 is clearly payable to the Petitioners as children of their mother; and the proviso in the will extends to all property acquired before the shares became payable to the children.

Mr. *Crossley*, for the trustees of the will.

Mr. *Selwyn*, in reply.

March 21. LORD ROMILLY, M.R., after stating the facts of the case, continued:—

The question is, whether the proviso contained in the will operates so as to compel the three children of the first marriage to bring their shares of the £1300 into hotchpot. Upon the best consideration I have been able to give to the subject, I think that the proviso in the testator's will must be considered as operating only in case the children of the first marriage took anything as children of their mother before the share of the residue of any one of them became payable. I do not think the proviso operated to

compel any one of the children afterwards to refund what they had already received. It is clear that the testator intended all the children to be put on an equal footing; but *William*, who attained twenty-one in January, 1866, thereupon became entitled to receive, and might have received, his one-fifth of the residue of his father's estate; and upon the death of his grandmother, by reason of his being one of the children of his mother who survived her, he became entitled to one-third of £1300. There is not any process by which, if he had received his one-fifth of the residue, he could have been compelled to refund what he had received, or by which his third of the £1300 could be brought into hotchpot for the benefit of the children of the second marriage. I think the proviso is meant to operate upon all the children of the first marriage alike, and that the testator did not intend that the mere circumstance of their attaining twenty-one before or after the death of the grandmother should give them different rights under his will. But, so regarding it, it is extremely difficult to give effect to the intention expressed by the testator. The proviso must, as I have said, be understood as applying to money to be received from the grandmother's settlement before their shares of the residue became payable. Now, if one of the children of the testator had died after the second marriage, and before attaining twenty-one, and without issue, the share of that child would have gone to his brothers, and to his sister, who did attain twenty-one, or to the issue of any one who died before that age leaving issue. How is the Court to work out such a proviso? How can it tell what share the Petitioner will take, until it is ascertained which of his brothers do or do not attain twenty-one? And upon what principle or authority can the Court impound the £1300 until the youngest child attain twenty-one, and then divide the fund as if the vesting had been postponed till that period? In the first place, I think the proviso can only relate to money received before the share of the residue should become payable, and that, so holding, the testator, by giving vested interests to his children in the residue, with gifts over in the event of their dying without issue before the shares became payable, has made it impossible for the Court to ascertain what the share of each child is on attaining twenty-one, and therefore made it impossible to carry his wish into execution without

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violating the rules of law, which entitle a person on attaining twenty-one to receive payment of the share which is vested in him.

I cannot say that I have felt no difficulty in deciding on this question, and I have in vain looked for any authorities to assist me; and I have therefore had recourse to, and relied on, the principles of the Courts of equity, which establish that a fund shall be divided as soon as possible, and that it will not postpone the payment in order to enlarge the class. In this I refer to the most familiar instance:—If a testator, by his will, leave a legacy to be divided equally amongst all the children of *A.*, this takes effect immediately on the death of the testator, although *A.* should be still alive, and be likely to have more children. It includes all the children then living, and no others; it excludes all after-born children, even though there be a gift over in the event of any one dying an infant. So, also, if a legacy be left to one for life, and after his death to all the children of *A.*, those born before the period of distribution will take, but not a child who may be born afterwards; that is, the class is to be ascertained at the period of distribution, and all others are excluded. Here, the children of Mrs. *Stares*, the first wife of the testator, who were to take under the grandmother's settlement, were ascertained at the death of Mrs. *Grant*, their grandmother, in November, 1866, and therefore they each became entitled to one-third of £1300. But previous to that time, the eldest son, who had attained twenty-one in January, 1866, had become entitled to receive his share, one-fifth of the residue. It is impossible to make him refund anything; and I am of opinion that on his attaining twenty-one his share of the residue was ascertained, and that, at the same time, the shares of his two brothers must be considered as having been also ascertained, and that they could not be altered by the fact of the subsequent death of the grandmother, and their becoming entitled to one-third of the £1300. The consequence is, that in my opinion the Petitioners, *William* and *Walter*, are each entitled to receive one-fifth of the residue.

Solicitors: Messrs. *Hampton & Burgin*, for Messrs. *J. & E. Hoskins, Gosport.*

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M. R.
1867
March 18, 22.

Principal and Surety—Joint and several Bond by Principal and Sureties—Non-execution by Principal—Release.

A surety, who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of his.

THE Defendants, Messrs. *Evans*, were coalowners. In March, 1864, one *J. C. Partington* became their agent for the sale of their coals, and entered into an agreement under seal with them for the faithful discharge of his duties. They also required him to procure sureties in a bond of £1000 for the fulfilment of the agreement; and he requested the Plaintiff, *Cooper*, and one *C. H. Partington*, to become such sureties. On the 15th of March, 1864, the agent of Messrs. *Evans* called upon *Cooper* with the engrossment of a bond for execution by him. Finding the bond to be a joint and several bond by *J. C. Partington* and two sureties, *Cooper* executed it, in the belief, derived from the form of the bond (which had been prepared by the Messrs. *Evans*), that *J. C. Partington* would also execute it; and he deposed that he would not have consented to execute it, had he been aware, or suspected, that *J. C. Partington* would not execute it. *J. C. Partington* never executed it.

In 1866, the Messrs. *Evans* became aware that *J. C. Partington* had committed a breach of his agreement, and they thereupon commenced an action on the bond against *Cooper*. *Cooper* pleaded *non est factum*, and he also applied for leave to plead a special equitable plea setting out the facts stated above; but the application was refused by Mr. Baron *Bramwell*, who was of opinion that the issue intended to be thereby raised might be raised on the other plea. The action was tried at *Liverpool*, on the 14th of August, 1866, when a verdict was found for the Messrs. *Evans*, for £1000, leave being reserved to *Cooper* to move to enter a nonsuit. A rule was obtained pursuant to the leave reserved,

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and on the 12th of February, 1867, it was discharged after argument. *Cooper* thereupon filed his bill to restrain execution upon the judgment, and the cause now came on to be heard upon motion for decree.

Mr. *Wickens*, for the Plaintiff:—

The decision at law does not conclude the case in equity: *Cumberlege* v. *Lawson* (1). The Plaintiff was led to believe from the form of the bond, which was prepared by the obligees, that the principal debtor would execute it; he has not executed it; and the Plaintiff, not having obtained the specific protection which he had a right to insist on, is entitled to be relieved: *Underhill* v. *Horwood* (2); *Bonser* v. *Cox* (3); *Evans* v. *Bremridge* (4).

Mr. *Baggallay*, Q.C., and Mr. *W. F. Robinson*, for the Defendants:—

The Plaintiff here relies only on his being misled by the form of the bond. In all previous cases there has been an actual agreement as to the nature of the security between the sureties and the creditors; or, at all events, something more than an implied condition.

Again, the defence now raised might have been equally well raised at law; it was, in fact, raised and failed. The same principles govern the rights of principal and surety at law and in equity: *Hawkshaw* v. *Parkins* (5); *Eyre* v. *Everett* (6); *Mackintosh* v. *Wyatt* (7); and no collateral equity is shewn here.

Finally, the Plaintiff is not substantially damnified: he will obtain all the relief which he could have got if *Partington* had executed the bond, by suing him in the names of the Messrs. *Evans* on his agreement with them.

Mr. *Wickens*, in reply:—

It is admitted on all hands that in some cases there is a

(1) 1 C. B. (N.S.) 709, see p. 725.
(2) 10 Ves. 209, see pp. 225, 226. At p. 226, lines 6, 8, 9, 10, for *obligee*, read *obligor*.
(3) 4 Beav. 379, affirmed on appeal, 8 Jur. 387.
(4) 2 K. & J. 174; 8 D. M. & G. 100; 2 Jur. N.S. 134, 1064, & 3 Jur. N.S. 1197.
(5) 2 Sw. 539.
(6) 2 Russ. 381.
(7) 3 Hare, 562.

difference between the rights of a surety in a Court of equity and in a Court of common law. This is one of those peculiar cases.

As to suing *Partington* on the agreement, it is much more easy and convenient to sue on the bond: at all events the Plaintiff is entitled to the specific security he contracted for.

March 22. LORD ROMILLY, M.R., after stating the facts, continued:—

The Plaintiff relies on *Bonser* v. *Cox* (1), and *Evans* v. *Bremridge* (2); but I think both these cases are distinguishable. In both there were to be two sureties; it was agreed that both the sureties should execute the security, and one of them did not. Thereupon the other said, "I intended to rely on my ability to sue my co-surety for one-half of the debt, but instead of that I have been made liable for the whole;" and it was held, both by Lord *Langdale*, and Sir *William Page Wood*, that this discharged the surety. But that is not the case here, for both the sureties have executed; but one of them says that, in addition, it was intended that *J. C. Partington* should execute the bond, whereas he has not executed it, and it is alleged that the Plaintiff is thus prevented from becoming a specialty creditor of *J. C. Partington*. But *J. C. Partington* has entered into an agreement under seal with the Messrs. *Evans*, and, upon properly indemnifying them, the Plaintiff will be able, in their names, to sue *J. C. Partington* upon this agreement, and to become a specialty creditor of his just as much as if he had executed this bond.

But, besides this, it is laid down in a long series of cases that the doctrines relating to principal and surety are the same at law and in equity. That was so laid down by the Vice-Chancellor in *Mackintosh* v. *Wyatt* (3), and there is a clear distinction between the cases which were cited to me on behalf of the Plaintiff and the present. Here the very case which the Plaintiff now sets up in equity has been raised at law, and it has been held that the

(1) 4 Beav. 379; 8 Jur. 387. (2) 2 K. & J. 174; 8 D. M. & G. 100.
(3) 3 Hare, 562.

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Plaintiff is properly liable. Under these circumstances the bill must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Sharpe, Parkers, & Jackson,* agents for Messrs. *Jenkins & Rae, Liverpool.*

Solicitors for the Defendant: Messrs. *Gregory, Rowcliffes, & Rawle,* agents for Messrs. *Duncans, Squarey, & Co., Liverpool.*

M. R. 1867 *Jun.* 31; *Feb.* 7.

WOOD *v.* WOOD.

Will—Gift to all the Children of A., except F.—Eldest Son—Younger Son becoming eldest.

Testator bequeathed £20,000 to his son *A.* for life, with remainder, "in case *F.*, the eldest son of *A.*, shall be living," to *F.* for life, with remainder to his children, and in default of children to the other sons of *A.* successively, in strict settlement. He also bequeathed a share of the residue to *A.* for life, with remainder to "all the children of *A.*, except *F.*" *F.* died in the lifetime of *A.*, unmarried, when *B.* became the eldest son of *A.*, and entitled on *A.*'s death to a life interest in the legacy of £20,000:—

Held, that, notwithstanding *B.* having become the eldest son, he was entitled to a share in the residue, and that the representatives of *F.* were excluded.

SPECIAL CASE.

Sir *Matthew Wood*, Bart., by his will, made in July, 1843, gave his residuary estate to trustees upon trust for sale and investment, and to stand possessed of so much of the trust funds as, at the average market price of consols for six months after his decease, should produce £20,000, upon trust for the testator's son, the Rev. *John Page Wood*, for life, or until he should anticipate, incumber, or assign the interest or dividends thereof, when the trust for his benefit should become void, and if it should so cease during his life, then in trust for the wife of the said *John Page Wood* during his life, and after the determination of the trust thereby declared for the benefit of the said *John Page Wood* and his wife, then as follows: "Upon trust in case my grandson *Frederick*, the eldest son of the said *John Page Wood*, shall then be living, and shall not have anticipated the dividends, then to pay the dividends

to the said *Frederick Wood* during his life," with a declaration that if the said *Frederick Wood* should anticipate, then the trust for his benefit should cease; and after the determination of the trust for the benefit of the said *Frederick Wood*, then upon the following trust: "Upon trust for the eldest son of the said *Frederick Wood* until he shall attain twenty-one years, or die previously without leaving issue male, and if such son shall live to attain twenty-one years, then in trust for him absolutely, and if such son shall die under twenty-one years leaving issue male, then upon trust for such person as shall be heir male of his body absolutely. But if the eldest son of the said *Frederick Wood* shall die under twenty-one years without leaving issue male, then upon trust for the second and every other successive son of the said *Frederick Wood* in like manner, and with a similar substitution of his issue male in case he should die under twenty-one years leaving such issue male, and in default of such children or issue then upon trust for all and every the other sons of the said *John Page Wood*" as therein mentioned; and in default of all such children or issue, then upon certain similar trusts for the benefit of the testator's other sons, and their respective issue. And the testator declared that the trustees should hold the residue of the trust fund upon trust, as to four-fifth parts thereof, for the benefit of his four children respectively other than the said *John Page Wood*, and as to the other one-fifth part, upon trust for the said *John Page Wood* for life, or until he should anticipate, the interest thereof when the trust for his benefit should become void and the trustees should hold the share in trust for his wife, and then as follows: "And after the determination of the trust hereby declared for the benefit of the said *John Page Wood* and his wife, upon trust for and for the benefit of all and every the child or children of the said *John Page Wood* (other than and except the said *Frederick Wood*), who being a son or sons shall attain the age of twenty-one, or being a daughter or daughters shall attain that age or be married, in equal shares. And if there shall be only one such child (other than and except as aforesaid) then the whole of the said trust moneys shall belong to that one child, and in case any one or more of the children of the said *John Page Wood* (other than and except as aforesaid)," being a son should die under twenty-one, or being a

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daughter should die under twenty-one or unmarried, then the share of the child so dying should be in trust for the other or others of such children "other than and except as aforesaid, to be equally divided; and in case there shall be no children of the said *John Page Wood* (other than and except as aforesaid), who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, then I direct that the trustees shall stand possessed of the one-fifth of my residuary personal estate, of whatsoever the same may consist, in trust for such person or persons as, at the decease of my said son, *John Page Wood*, and such failure of children as aforesaid, shall be entitled to his personal estate as his next of kin (not excluding, in such case, the said *Frederick Wood*)."

The testator died in September, 1843. His son, *John Page Wood*, became on his death Sir *John Page Wood*, Bart.

Frederick Wood, the grandson of the testator, and in his will named the eldest son of Sir *John Page Wood*, died in 1851, having attained the age of twenty-one, but without having been married, and thereupon the Plaintiff, Sir *Francis Wood*, became the eldest surviving son of Sir *John Page Wood*.

By a settlement made on the marriage of Sir *Francis Wood*, his interest under the will was assigned to trustees in trust for his wife and the children of the marriage.

Sir *John Page Wood* died in February, 1866, without having done any act to forfeit his life estate in the one-fifth part of the ultimate residue, and on his death the ultimate residue of the estate became divisible. Sir *John Page Wood* had seven children (other than the said *Frederick Wood*) who all attained twenty-one.

The special case was filed for the opinion of the Court on the construction of the testator's will: Sir *Francis Wood*, and those claiming under him, were Plaintiffs, and the surviving children of Sir *John Page Wood*, and those in whom their interests were vested, and Sir *William Page Wood* and *Gordon Whitbread*, who represented the estate of *Frederick Wood*, deceased, were Defendants.

The questions submitted to the Court as to the one-fifth part of the ultimate residue were, first, whether Sir *Francis Wood* was entitled to any and what share in it; and, secondly, whether the

estate of *Frederick Wood*, deceased, was entitled to any and what share in it.

The Plaintiffs contended that the one-fifth part was distributable in seven equal shares. The Defendants contended that, as the Plaintiff, Sir *Francis Wood*, by the death of *Frederick Wood*, became the eldest son of Sir *John Page Wood*, and entitled to a life interest in the said sum of £20,000, he ceased to have any interest in the one-fifth part of the residue, and that the one-fifth part became divisible in six equal shares among the younger children, exclusive of the estate of *Frederick Wood*.

Mr. *Selwyn*, Q.C., and Mr. *W. Pearson*, for the Plaintiffs:—

In this case the one-fifth part of the ultimate residue is divisible into seven equal shares. The words "other than and except the said *Frederick Wood*," in the trust for all the children of *John Page Wood*, can only except *Frederick Wood* himself, and cannot be construed as excepting from the gift a younger son becoming an eldest by *Frederick's* death. The words of the clause being grammatical, and clearly pointing to all the other children except *Frederick*, you cannot go beyond the words of the will to put a different construction upon it. In *Jermyn* v. *Fellows* (1), where money was, by a private Act of Parliament, to be appointed among three younger children, who were named, including *Stephen*, who afterwards became an eldest son, an appointment in his favour was held by Lord *Talbot* to be valid. The cases in which a younger child becoming an eldest is excluded arise under settlements, or where provision is made by a parent, or one *in loco parentis*, as in *Sandeman* v. *Mackenzie* (2), where it was laid down that the rule that a limitation in favour of younger children will not operate in favour of a younger child becoming an eldest and succeeding to the estates, was confined to cases where the provision was made by a parent, or a person *in loco parentis*. So in *Scarisbrick* v. *Lord Skelmersdale* (3), where real estate was so settled as on the death of a parent to go to the eldest son, and provision was made by the settlor, being *in loco parentis*, for the younger children, it was held that the word "younger" was intended to include all

(1) Cas. t. Tal. 93.
(2) 1 J. & H. 613.
(3) 4 Y. & C. Ex. 78.

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the children except the one who succeeds to the estate. But there it was distinctly laid down that the rule did not apply to the case of a will in which the primary object of the testator appeared to be to found a family, or do something beyond making provision for children.

Mr. *Southgate*, Q.C., and Mr. *Prendergast*, Q.C., for some of the younger children :—

We contend that the one-fifth share is divisible into sixths, and that the Plaintiff, Sir *Francis Wood*, is excluded. The whole scheme of the will shews that *Frederick* is excepted from the gift in question simply because he happened to be the eldest son. The limitation referred to in *Sandeman* v. *Mackenzie* (1) does not prevent the application of the rule to the present case, for Sir *Matthew Wood* was the grandfather of the objects of this gift. In *Lord Teynham* v. *Webb* (2), where there was a power of appointment given to a father among younger children, and a younger child became an eldest and was excluded, the power was created by the grandmother of the children. So in *Lady Lincoln* v. *Pelham* (3), where, under a bequest to younger children, the second, having become eldest, was excluded, the testator was, as here, the grandfather. Therefore the present will comes within the rule of the Court, and, reading the exception in the way which, on the fair construction of the will, we are entitled to do, namely, as meaning "the eldest son for the time being," Sir *Francis Wood*, who takes a life interest in the legacy of £20,000, is, in the event that has happened, excluded from the share.

Mr. *Bickley Rogers*, for the representatives of *Frederick Wood's* estate :—

If the words in the clause were "other than and except an eldest son," there would be no question that *Frederick Wood's* representatives would be included. In looking to the intention of the testator you must endeavour to ascertain the purport of the dispositions by his will. Thus, in *Hart* v. *Tulk* (4), the words "the said fourth schedule" in a will were held to mean "the said fifth

(1) 1 J. & H. 613; 7 Jur. N.S. 1231.
(2) 2 Ves. Sen. 198.
(3) 10 Ves. 166.
(4) 2 D. M. & G. 300.

schedule," upon a consideration of all the provisions in the will, and of the state of the testator's property and family when the will was made, though they involved no material contradiction to the other provisions. The case of *Abbott* v. *Middleton* (1), affirmed by the House of Lords (2), is one where the Court has supplied or altered words when required by the scope of the will.

Whenever the Court sees that the intention of a testator is to provide for an eldest son in one way and for the rest of the family in another way, the Court will presume that it was his intention that no child should be unprovided for, and that no child shall be provided for in two ways. This is the case in the present will. In *Duke* v. *Doidge* (3), an elder son, unprovided for by collateral relations, was considered as a younger. In *Chadwick* v. *Doleman* (4) there was a power of appointment in a settlement of £4000 for the younger children, which was exercised by the donee of the power by appointing it among his younger children, and £2600, part thereof, to *B.*, his second son. The eldest son afterwards died, and the father made a fresh appointment of the £2600 to one of his daughters, which was held to be good, as the first was made to *B.* on the implied condition that he should not become an eldest son. In *Ellison* v. *Thomas* (5), where a sum of money directed to be raised was to be held in trust for all the children of a tenant for life, other than and except an eldest or only son for the time being, the exclusion was held to apply only to the person who was the eldest son at the time appointed for raising the money, and that the representatives of an eldest son who had died before that period were entitled to participate. In *Davies* v. *Huguenin* (6), which was a very similar case, but where the exception was "other than their eldest or only son," without the words "for the time being," the representatives of the eldest son, who died before the fund was to be raised, were held entitled to a share. *Remnant* v. *Hood* (7) is a decision of a similar character. In the present case the testator only intended one person to be excluded, and referred to *Frederick*, not in his personal

(1) 21 Beav. 143, 1 Jur. N.S. 1126.
(2) 7 H. L. C. 68, 5 Jur. N.S. 715.
(3) 2 Ves. Sen. 203, n.
(4) 2 Vern. 528.
(5) 1 D. J. & S. 18.
(6) 1 H. & M. 730.
(7) 2 D. F. & J. 396.

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capacity, but simply as being his eldest son. The case of *Jermyn* v. *Fellows* (1), which was relied on by the Plaintiffs' counsel, is thus commented on by Lord *St. Leonards* in his treatise on Powers (2). "The case seems to establish this principle, that where a younger child is included by his *name* in a power, he will continue an object of the power although he lose his character of younger son. But Lord *Talbot* principally distinguished this case from that of *Chadwick* v. *Doleman* (3), on the ground that there the question was between the eldest son, become so by his brother's death, and the other younger children, whereas in the case before him *Stephen*" (the one to whom the appointment was made) "was the only child left, and the dispute was between him and the administrator of a deceased child, so that this case cannot perhaps be relied on as an authority for the general principle, which at first sight it seems to establish; and certainly if the rule in *Chadwick* v. *Doleman* is the law of the Court, the question in these cases ought to be, not whether the younger children are in the instrument creating the power called 'younger children,' or by their proper names, but whether upon the whole instrument taken together they are treated as younger children, and whether, judging from the evidence to be collected from the instrument itself, a portion would have been provided for them if they had stood in the place of their eldest brother."

It is, therefore, clear, that the fact of *Frederick Wood* being by name excluded, will not exclude his representatives, when the intention was only to exclude the eldest son for the time being.

Mr. *Woodhouse*, for one of the younger children, referred to *Gray* v. *Earl of Limerick* (4).

Mr. *Rowcliffe*, for another Defendant.

LORD ROMILLY, M.R.:—

Mr. *Selwyn*, I need not trouble you to reply, because I have had occasion to look at this will, and really all the cases agree on this subject. There may be occasionally some difficulty as to the

(1) Cas. t. Tal. 93.
(2) 8th Ed. p. 679.
(3) 2 Vern. 528.
(4) 2 De G. & Sm. 370.

application of them, but they all agree in this: that if the eldest son is excluded, by reason of his being the eldest, then a younger son who becomes the eldest son is excluded also. That is the principle of all these decisions. In the passage which Mr. *Bickley Rogers* read to me, from Lord *St. Leonards'* book, he puts it upon that principle, which he says is that where you find such to be the intention of the settlor, whether it is by will, or whether it is by deed, the consequence follows that the eldest son is excluded.

But on looking over this will I am unable to come to the conclusion that this principle applies to the present case. In order to make it do so the intention of the testator must be clearly expressed; but I can find only one expression in this will which affords any countenance to the contention which is made. I am bound by the late decisions, which state that the Court must follow the directions laid down by the testator himself—that it must not construe his will by similar expressions to be found in other wills, but that it must look at what the testator himself has said.

If the testator intended to exclude an eldest son, he ought to have said so; but he says throughout that he intends to exclude his grandson, *Frederick*, and it is only on one occasion in the will that I can find that he calls him "the eldest son," and then it appears to me to be by way of description, and not by way of indicating the character of the person to be excluded.

[His Lordship then read the clause of the will containing the trusts of the sum of £20,000.]

This is the only passage in the will where the words "eldest son" occur. It does not appear here in the gift, but really is a designation and description of the person; for it is "upon trust in case my grandson *Frederick*, the eldest son of my son *John P. Wood*, shall then be living, then to pay the same——" To whom? Not to *Frederick Wood*, the eldest son, but to *Frederick Wood* personally; not to *Frederick Wood* in his character of eldest son, not to the eldest son for the time being, but to pay it to *Frederick Wood*, and if *Frederick Wood* shall anticipate, then the trust is to become void, and after the determination of the trust for his benefit it is to be in trust for the eldest son of *Frederick Wood* until he shall attain the age of twenty-one years. Then if the eldest son

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of *Frederick Wood* shall die under the age of twenty-one without leaving issue, for his second and every other son, and in case they shall die, for the second and every other successive son of the testator born in his lifetime, and so on in strict settlement.

In the gift of the one-fifth part of the residue, as to which the question arises, he directs that "from and after the determination of the trusts thereby declared for the benefit of *J. P. Wood* and his wife it shall be held upon the trust following: "Upon trust to and for the benefit of all and every the child and children of the said *J. P. Wood,* other than and except"—whom? Not the "eldest son," which would be very distinct and clear, but "other than and except the said *Frederick Wood.*" Supposing he had an objection to *Frederick Wood,* and intended him not to take, could he have expressed it more clearly? And why am I here to interpolate the words "provided he is such eldest son," which I must do in order to give the will the effect and meaning contended for? The testator then proceeds thus, "that in case there shall be no children of *John P. Wood,* other than and except as aforesaid;" that is, other than and except *Frederick Wood,* "who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, then I direct that the trustees shall stand possessed of the one-fifth of my residuary personal estate, of whatsoever the same may consist, in trust for such person or persons as at the decease of my said son, *J. P. Wood,* and such failure of children as aforesaid," shall be entitled to his personal estate as his next of kin, "not excluding in such case the said *Frederick Wood.*" Therefore he specifies in what case he intends him to take, but never treats him as eldest son, except in one case, where he does so for the purpose of description, and which he omits in the other cases where he makes him the object of the gift.

This is a will carefully and skilfully prepared by a draughtsman who understood well what he was about, under instructions from the testator. The testator must have anticipated the possibility of an elder son dying, and another son becoming the eldest son; and no conveyancer could have drawn this will without having had such a contingency present to his mind.

Why does he carefully omit the words "eldest son" in every case except one, where they are used as the description of *Frederick*

Wood, and not in designating him as the object of the gift? The answer is obvious. It was necessary to do so, for supposing that *Frederick* had died, and another son had been born after his death, who had been christened "*Frederick*," this second *Frederick* would not have been excluded, because the testator pointed out that it was *Frederick*, the eldest son, who was to be excluded, and not another *Frederick* who might come into existence. The testator nowhere, that I can see, throughout the will, treats this as one in which the eldest son is to have the benefit confined to that character, and is to be excluded from all other benefits. If he so intended, in my opinion he has not so expressed it, and the Court must follow the exact words of the will.

Therefore I shall answer the questions in the case accordingly, that *Frederick* and his representatives alone are excluded, because the words excluding *Frederick* will extend to his representatives. Of course, if there should be a total failure of all other issue, then he is, by the words of the will, included, but that case does not arise.

The Plaintiffs are entitled to one-seventh of one-fifth of the residue.

Solicitor for the Plaintiffs: Mr. *S. B. Somerville.*

Solicitors for the Defendants: Messrs. *Tatham, Curling, & Co.*; Messrs. *Field, Roscoe, & Co.*; Messrs. *Brooks & Dubois.*

V.-C. S.
1867
March 15.

BIRCH *v.* SHERRATT.

Will—Annuity, payable out of Income.

A testator directed his trustees to convert and invest the whole of his estate, and with and out of the annual proceeds to levy and raise the annual sum of £100, and to pay the same to *A. S.* for life, "and from and after the payment," and "subject thereto," to pay the income of the trust funds in thirds to the persons named in the will for life, and to divide the principal amongst their children. The income of the fund was insufficient for the payment of the annuity in full:—

Held, that the annuity was not payable out of the *corpus*, and that the income only must be paid to the annuitant during her life.

Revd in L.J. 2 Ch. 644?

JOHN S. SHERRATT, by his will, dated the 13th of May, 1847, devised and bequeathed all his real and personal estates to three trustees upon trust to dispose of his real estate, and to stand possessed of the proceeds upon the trusts declared concerning his personal estate, and upon trust to convert his personal estate into money, and to invest the whole as therein mentioned, and "with and out of the interest, dividends, and annual proceeds of the said trust fund, levy and raise the annual sum of £100 . . . and pay the same" quarterly "to his mother, *Ann Sherratt*, and her assigns" for life; "and from and after the payment of the said annual sum of £100, and subject thereto," to stand possessed of the trust funds as to one undivided third part of the income, upon trust to pay the same to his brother *William* for life, and, after his decease, to pay the same to his wife for life, and, after both their deaths, upon trust to divide the principal amongst their children equally. The other two thirds of the income were bequeathed upon similar trusts for the benefit of the testator's brother *Thomas*, and sister *Eliza*, and their children respectively.

The testator died in June, 1847, leaving his mother and brothers and sister surviving.

Thomas Sherratt died in February, 1865, leaving a widow and two children surviving.

In June, 1859, a suit was instituted for the administration of *John S. Sherratt's* estate. The Chief Clerk, in February, 1861, certified that no payment had been made in respect of the annuity

of £100, and that the same was due from the 5th of June, 1847. Under an order made in June, 1861, the funds were transferred into Court, and there was now standing to the credit of the cause the sum of £3314 4*s.* 5*d.*, but out of it there was due to the estate of *John Sherratt*, deceased, the sum of £1824 11*s.* 1*d.* and certain costs. The balance represented the fund available for the payment of the annuity of £100, and *Ann Sherratt* claimed to be paid her annuity and arrears, which now amounted to the sum of £1925, out of it. The fund was not sufficient to pay the arrears or the annuity.

This was a Petition by the surviving trustees, praying, *inter alia*, for a declaration in what manner the annuity and arrears were to be paid.

Mr. *Greene*, Q.C., and Mr. *Faber*, for the trustees.

Mr. *Rigby*, for *Ann Sherratt*:—

This is clearly a case of an annuitant being entitled to be paid out of the *corpus*. There is a dedication of the dividends generally, without any limit, for the trustees are to levy and raise a sum sufficient to pay the annuity, and those words give them power to pay it out of the *corpus*. Where there is a direction to pay an annuity out of rents and profits, or out of dividends *simpliciter*, that gives the annuitant a right to go upon the *corpus*.

The other trusts declared are "subject to" the payment of the annuity. This is not the case of a tenant for life and remainderman, or the annuitant would be entitled to the dividends only, as in *Foster* v. *Smith* (1) and *Earle* v. *Bellingham* (2). In *Baker* v. *Baker* (3) there was no gift of an annuity, but of a specific fund. It was called an annuity, yet it was held that it was no annuity (4). The annual dividends only were given, and the entire capital was given over after the death of the tenant for life.

In *Stelfox* v. *Sugden* (5) the principle of the earlier cases was adhered to. That case was analogous to the present, and upon the authority of that case, and the decisions in *Perkins* v. *Cooke* (6)

(1) 1 Ph. 629.
(2) 24 Beav. 445, 3 Jur N S 1237
(3) 6 H. L. C. 616, 4 Jur N S 491
(4) 6 H. L. C. 623, 4 Jur N S 491
(5) Joh. 234, 240.
(6) 2 J. & H. 393, 8 Jur N S 1150

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and *Phillips* v. *Gutteridge* (1), this annuitant ought to be paid out of the *corpus*.

Mr. *Cole*, Q.C., for the children of *Thomas Sherratt*:—

The testator meant that the annuitant and the residuary legatees should derive a benefit under his will, but if the contention of the annuitant should be acceded to, the fund would be wholly swallowed up by her. The use of the words "levy" and "raise" is of no importance at all. The case of *Baker* v. *Baker* (2) is a clear authority against the claim of this annuitant. In *Sheppard* v. *Sheppard* (3) annuities were given, and "subject to" the trusts to pay them the residue was given to other persons, and it was held that the annuities were not charged on the *corpus*. In that case there was no direction to convert real estate, but in *Miller* v. *Huddlestone* (4) there was a complete conversion, and a direction to invest, and it was held that the annuities there given were not payable out of the *corpus*. The cases of *Foster* v. *Smith* (5), *Earle* v. *Bellingham* (6), and *Stelfox* v. *Sugden* (7), are clearly authorities for the contention that this annuitant is entitled out of the income only.

Mr. *Cracknall*, for *William Sherratt*.

Mr. *Lindley*, for another residuary legatee.

Mr. *Rigby*, in reply:—

The payment was to be made out of the dividends generally. If the annuitant should not be entitled to touch the *corpus*, she would be entitled to the future dividends until all her arrears were paid. The payments could not be limited to the life of the annuitant. Nothing is given over till after all arrears have been satisfied.

Miller v. *Huddlestone* has no application to this case.

SIR JOHN STUART, V.C.:—

The duty of the Court is so to construe the language of a testator as to give effect, as far as possible, to every direction which the

(1) 8 Jur. (N.S.) 1196. 3 De G. J. 332
(2) 6 H. L. C. 616; 4 Jur. N.S. 491
(3) 32 Beav. 194.
(4) 3 Mac. & G. 513.
(5) 1 Ph. 629.
(6) 24 Beav. 445; 3 Jur. N.S. 1237
(7) Joh. 234.

will contains. In this case the trusts and purposes declared as to the capital are as clear and imperative as those declared as to the income.

The annuity of £100 is directed to be paid out of the income.

It has been argued that the testator directs his trustees to stand possessed of the fund, subject to the payment of the £100 a year to the annuitant, and that their duty is to levy and raise any deficiency of income out of the capital.

I can find no words in the will which authorize either the trustees or the annuitant to touch the capital. The capital is devoted to purposes as certain as those declared as to the income.

The strongest words in favour of the annuitant are "subject thereto," but they mean subject to the payment of the annuity out of the income. There must be an inquiry what portion of the fund in Court consists of capital and what of income, and a declaration that the annuity is not charged upon, nor payable out of, the *corpus*, and that the income only of the fund be paid to the annuitant during her life.

Solicitors: Messrs. *Sharp & Ullithorne;* Messrs. *J. & C. Cole;* Messrs. *Swann & Co.*; Mr. *Edwin Smith.*

V.-C. W. 1867 March 16, 18.

LIVERPOOL MARINE CREDIT COMPANY *v.* HUNTER.

Mortgage of a Ship—Consignment to New Orleans—Proceedings by Creditors in Foreign Court—Law of Louisiana—Rights of Creditors and Mortgagees—Comity of Nations.

The owner of a British ship, having mortgaged it in *England*, employed a *Liverpool* firm to consign it to their agents at *New Orleans*. As the *New Orleans* firm happened to be creditors of the owner, the *Liverpool* firm, in consideration of their having the consignment, instructed their agents not to proceed against the ship at *New Orleans*, but to remit the proceeds to the mortgagees. Afterwards, the *Liverpool* firm getting into difficulties, some of the mortgagees insisted on the consignment being changed, and the *Liverpool* firm withdrew their instructions. When the ship arrived, the *New Orleans* firm brought actions in their Courts against the owner; and, as the Courts of *Louisiana* do not recognise the rights of mortgagees without possession, writs of attachment were obtained, under which the ship was seized. The mortgagees then, to prevent the ship being sold, gave to the *New Orleans* firm bonds for the amounts to be recovered in the actions, upon which the ship was released.

The mortgagees filed this bill to restrain the holders of the bonds from suing on them, and to have the bonds delivered up:—

Held, on demurrer, that the Court had no jurisdiction to stay proceedings on the bonds: first, because this Court would not have restrained execution of the attachment at *New Orleans*, as it could not have placed all the creditors, foreign and domestic, on an equal footing; secondly, because, if it could have done so, the mortgagees should have sought to restrain the attachment, and not have placed themselves in a worse position by giving the bonds; and, thirdly, because, if the prayer were granted, the Courts of *New Orleans* would never, in future, release an English ship on the bond of a mortgagee.

THIS was a demurrer. *aff'd by L.C. 3 Ch 479*

The bill alleged that three of the Defendants were in November, 1865, carrying on business as merchants, at *Liverpool*, under the style of "*Fernie, Brothers, & Co.;*" that four other of the defendants, *Hunter*, *Boult*, *English*, and *Brandon*, were also in business at *Liverpool*, as merchants, under the firm of "*Boult, English, & Brandon;*" and that the above seven Defendants, with an eighth, named *Askew*, were all in partnership together, as merchants, at *New Orleans*, under a style or firm, which in April, 1866, was changed to, and now was, "*Hunter, Askew, & Co.;*" and the two *Liverpool* firms, and the *New Orleans* firm, acted as mutual agents; and that all the Defendants were British subjects, and all (except

Askew, who was temporarily resident at *New Orleans*) within the jurisdiction.

The bill also contained the following allegations:—

Henry Lafone, of *Liverpool*, being the registered owner of a British ship called the *Pacific*, by deed of the 23rd of December, 1865, mortgaged the vessel to the Plaintiffs, who were a limited company, for a sum of £18,000, and interest at £10 per cent. This mortgage was duly registered at Liverpool on the 23rd of December, 1865. Another limited company, called the "*Liverpool Shipbuilding Company*," were entitled to £6000, part of this mortgage.

In May, 1866, *Fernie, Brothers, & Co.* stopped payment. About the same time, *Lafone* became liable to *Hunter, Askew, & Co.* in considerable sums, on several different accounts.

In October, 1866, the *Pacific* was consigned by *Boult & Co.* as the agents of *Lafone*, and with his concurrence, to *Hunter, Askew, & Co.*, at *New Orleans*, "upon the assurance and undertaking of *Boult & Co.*, and the personal assurance and undertaking of the Defendant, *William Hunter*, on behalf of *Hunter, Askew, & Co.*, that the said firm would not attempt to take proceedings against the said ship abroad, but would remit the freight to her mortgagees as an independent transaction;" and *Hunter* instructed the foreign firm, "if the *Pacific* came consigned to them, to leave the balance of her account on its own merits, and to account for the freight independently of all other transactions."

Boult & Co. about this time being in difficulties, the *Liverpool Shipbuilding Company* did not approve of their continuing to act as brokers, and changed the consignment of the ship to another firm; whereupon the Defendants (except *Askew*) "cancelled their instructions to *Hunter, Askew, & Co.*, and advised them to consult their solicitor, and, if they could, to arrest the ship on her arrival at *New Orleans* for all moneys due to them from *Lafone*."

In pursuance of these instructions, *Hunter, Askew & Co.* commenced actions against *Lafone* in one of the Courts at *New Orleans* for the recovery of the above-mentioned debts, and applied for and obtained in the same actions writs of attachment, under which the *Pacific* was, on the 27th of November, 1866, seized by the sheriff of *New Orleans*.

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"By the law of *Louisiana* transfers of property in chattels without delivery of possession are not recognised, and the title of the Plaintiffs as first mortgagees of the ship would have been wholly disregarded by the Courts at *New Orleans*, if the Plaintiffs had attempted to assert the same in the said Courts, and the ship would have been sold by order of the said Courts as the property of *Lafone*, and the proceeds applied towards payment of the debts for which the actions were brought, without any regard to the rights of the Plaintiffs as mortgagees of the ship. Under these circumstances, the only means by which the Plaintiffs could prevent the sale of the ship and recover possession of her was by giving bonds to the Plaintiffs in the actions, as security for the payment of the amounts which might be received therein and costs." Accordingly, the Plaintiffs gave *Hunter, Askew, & Co.*, bonds as security for repayment of the amounts to be recovered in the actions against *Lafone*, and costs, upon the execution and delivery of which the ship was released on the 6th of December, 1866.

On the 15th of January, 1867, *Lafone* entered into a deed of assignment for the benefit of his creditors, under the *Bankruptcy Act*, 1861, which was duly registered.

The Defendants, though bound by the deed of assignment, were nevertheless proceeding with the actions against *Lafone*, and intended to take proceedings against the Plaintiffs upon the bonds, for the purpose of enforcing payment from the Plaintiffs of the sums which they might recover in the actions against *Lafone*.

The bill charged that the Defendants' proceedings were a fraud upon the Plaintiffs and upon the policy of the law, and prayed for an injunction to restrain the Defendants and their agents from taking or continuing any proceedings at law or in equity, at *New Orleans* or elsewhere, against the Plaintiffs, or their agents, for the purpose of enforcing the bonds, and that the bonds might be delivered up to be cancelled; also that if the Defendants, or either of them, should proceed on the bonds at *New Orleans*, or elsewhere, and recover money from the Plaintiffs under any judgment or decree founded thereon, it might be declared that the Defendants were personally liable to the Plaintiffs for the amount of such moneys and interest,

and that the Defendants might be ordered to pay the same accordingly.

The four Defendants, members of the firm of *Boult, English, & Brandon,* demurred for want of jurisdiction and want of parties.

Mr. *G. M. Giffard,* Q.C., and Mr. *W. F. Robinson,* for the demurrer:—

The question in this suit is wholly independent of any such principle as was acted upon in *Simpson* v. *Fogo* (1). In that case the bill was to make good the claims of mortgagees against a vessel which had been sold to a purchaser, without regard to their rights. This is a suit to restrain the holders of bonds from making good their securities. There is nothing to shew that the Plaintiffs attempted to restrain the actions at *New Orleans* in any Court of equity that may exist there: hence no question of the comity of nations arises.

The chattel is here; the ship is an English ship; and the Plaintiffs, who actually hold the ship as a security for their debt, are seeking to deprive the Defendants of the benefit of their judgment. The Court of Chancery will not interfere with proceedings against a debtor in a foreign Court. In *Pennell* v. *Roy* (2), where there was an English bankruptcy, the debtor being an Englishman, but seised of real estate in *Scotland,* the Court refused to interfere with proceedings taken in *Scotland* by a creditor who had not proved under the bankruptcy, to recover an amount equal to what his dividend under the bankruptcy would have been.

Such a bill as this cannot be maintained in this Court, otherwise the conflict of laws would be interminable. The Courts at *New Orleans* would never hereafter release an English ship upon bond.

The demurrer is also maintainable for want of parties, assuming that any equity exists at all. At least we are entitled to such beneficial interest in the vessel as *Lafone* possessed in her when he executed the deed of assignment; and on the Plaintiffs' own shewing the assignees ought to be here.

Mr. *Kay,* Q.C., and Mr. *Fischer,* for the bill:—

In the first place, all the Defendants are domiciled Englishmen,

(1) 1 J. & H. 18; 1 H. & M. 195. (2) 3 D. M. & G. 126;

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and all (except *Askew*) resident here; and the debt is an English debt. They are all, therefore, subject to the jurisdiction of this Court.

[The VICE-CHANCELLOR:—You must put the case as high as this, that this Court could have restrained the issue of the attachment in *New Orleans*.]

That must be admitted. But it will be observed that we are not suing our mortgagor, but creditors of our mortgagor. We had no right to intervene in the action by *Lafone's* creditors against him until our chattel was attached. The bill alleges (what for the purpose of the argument must be taken to be true) that *Hunter, Askew, & Co.*, in instituting proceedings at *New Orleans*, acted solely as agents of *Boult & Co.* The ship was sent to a country where the rights of mortgagees are disregarded, as all the parties knew, and the withdrawal of the original instructions was an inequitable proceeding.

[The VICE-CHANCELLOR:—The original instructions seem to have been given as a consideration for *Boult & Co.* having the consignment. When the consignment was changed, the instructions were changed.]

We say that by the mortgage the ship became our legal property. It stands thus, that *Boult & Co.*, knowing of our title, took the ship, not out of *Lafone's* possession, for he had none, but out of our possession, and consigned her to their consignees. Our rights as true owners are regulated, not by the *lex fori*, but by the law of *England*, where the contract was made. The ship was not the property of *Lafone*, and that is why he was not made a party. The attachment was absolutely invalid to all intents and purposes; and the Defendants have inequitably availed themselves of the procedure of a foreign State.

That the Court will interfere to restrain inequitable proceedings in Courts of law, is beyond dispute. The question in all cases is, what are such circumstances as will induce the Court to interfere?

[The VICE-CHANCELLOR:—If the judgment creditor had come

here and proceeded against the ship, I should have dealt with him as in *Simpson* v. *Fogo* (1).]

In *Bushby* v. *Munday* (2), the Court stayed proceedings in *Scotland* to enforce out of land in *Scotland* a bond given by the Plaintiff to the Defendant to secure money won at play. *Lord Portarlington* v. *Soulby* (3), was a similar decision with respect to *Ireland*. The principle is laid down in *Carron Iron Company* v. *Maclaren* (4); and as to personal estate was followed in *Hope* v. *Carnegie* (5).

In *Talleyrand* v. *Boulanger* (6), Lord *Loughborough* restrained proceedings by arrest, by one French refugee against another, on the ground that the creditor could not, in *France*, have subjected the debtor to personal arrest.

The demurrer admits that the Courts of *Louisiana* do wrong by disregarding the law of nations, and that the Plaintiffs' only means of saving the property was to give these bonds; and we submit that the whole proceeding is a device which the Court will not permit to succeed.

The case differs in no way from *Simpson* v. *Fogo*, because the Defendants are all British subjects. *Wright* v. *Simpson* (7) also applies.

Mr. *W. M. James*, Q.C., and Mr. *Rowcliffe*, for the Defendants, *Fernie & Co.*, who had been served with notice of motion for injunction, but who had not demurred.

SIR W. PAGE WOOD, V.C.:—

The prayer of this bill is founded on the doctrine which I upheld in the case of *Simpson* v. *Fogo* and which I shall continue to uphold. But the relief which is here sought appears to me to go far beyond what was decided in *Simpson* v. *Fogo*, and far beyond the authorities on which, if not as to fact, yet to the fullest extent as to principle, my decision in that instance was based.

The conclusion at which I arrived in *Simpson* v. *Fogo* was simply

(1) 1 J. & H. 18; 1 H. & M. 195.
(2) 5 Madd. 297.
(3) 3 My. & K. 104.
(4) 5 H. L. C. 416, see p. 439.
(5) Law Rep. 1 Ch. 320.
(6) 3 Ves. 447.
(7) 6 Ves. 714.

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this: It is undoubtedly part of the law of nations, as was stated by Lord *Eldon* in *Wright* v. *Simpson* (1), to recognise the judgments and the procedure of the tribunals of all nations administering justice among their subjects, pursuant to natural justice and equity. But if, in examining a judgment as we are at liberty to do, we find on the face of it, as appeared to Lord *Loughborough* in *Talleyrand* v. *Boulanger* (2), and as appeared in several other instances which have been referred to at common law, that a course of procedure has been adopted which is inconsistent with natural justice, then this Court will not give effect to the decision and to the authority which it would otherwise be perfectly willing to recognise. It sometimes happens, for instance, that foreign Courts proceed to judgment in the absence of the party against whom the proceedings are taken, or after inadequate notice of trial.

Upon this principle, where a judgment had been given in the Courts of *Louisiana*, dealing with a ship as the property and assets of a debtor against whom proceedings had been taken, in utter disregard of the rights of a mortgagee whose mortgage was good and valid at the time of the decision, though not manifested by some mode of proceeding peculiar to the local Courts at *New Orleans*, when the ship came here, I felt myself at liberty to say that the law of this country prevailed with regard to that ship, and that the rights of the mortgagee had not been displaced by the action of the foreign court. I observe that in a case at common law it was supposed that in *Simpson* v. *Fogo*, I acted upon some adoption of the *lex talionis*—that we would not recognise their law because they would not recognise ours. But I entertained no notion of that kind; the principle was simply as I have stated it above. In that case, I was particularly anxious to draw a distinction between judicial procedure and the statute law of a foreign State. Every nation may make its own statute law; as we, for instance, have adopted the rule of order and disposition in bankruptcy, independently of the laws of other nations; and that statute law, however harsh and arbitrary it may be, is binding on the subjects of other States whenever they come within its jurisdiction. But the peculiarity in the case of *Louisiana* is this—that *the Legislature* of

(1) 6 Ves. 714, 730. (2) 3 Ves. 447.

the State has enacted no such law, as that it is for the benefit of the citizens to declare that whoever brings a chattel into their jurisdiction as the apparent owner, shall be deemed to be the true owner. It is only the Judges of the Courts who have said, "We think this is the best way in which the title to the property can be manifested, and accordingly we hold that it cannot be manifested in any other way." That is contrary to the principles of judicature established by the Courts of every other country, as has been pointed out by Mr. Justice *Story*. That being so, had the question been one of the title to this ship, I should certainly have disregarded any decision of the Courts of *New Orleans*, so far as it may have been founded upon the unreasonable rule to which I have referred.

But I am asked to go a step further. It has been argued that, the municipal law of *Louisiana* being in this state, if a British subject trading in *Louisiana* has a counting-house or an agency at *New Orleans*, and a debtor of his comes to the port with a ship which has been mortgaged, it is contrary to equity and justice that the British trader should sue his debtor at *New Orleans* at all, and take the ship in execution, because he knows that by the law of the State the rights of the mortgagee will be disregarded. If the Court were to accede to this contention, it would follow that a British merchant here ought to be restrained from taking proceedings through his agent abroad against the ship, according to the law of *Louisiana*. That law may be administered in a way which we do not approve; but it is one thing for this Court to deal with the ship when it comes home, and is within the jurisdiction, and a very different thing that this Court shall say to every British subject in *Louisiana* to whom a debt is owing from another British subject, "You shall not have the same remedies against your debtor, as are open to everybody else living in the State."

It was argued by the counsel for the Plaintiffs, that if a subject of *Louisiana* being a creditor, were to sue his debtor under these circumstances in this country, this Court would have power to restrain him. I doubt that; but here the question is this,—Any foreign creditor of a British subject in *Louisiana* may attach and proceed to sell his ship, regardless of the British law. Is a British subject alone, then, to be deprived of this right? Is he to stand by and see the whole of his debtor's

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assets irremediably swept away and disposed of by the foreign creditor, on the ground that this Court will hold it inequitable that he should concur in any proceedings which will enable him to be paid *pari passu* with the other creditors? The principle, I suppose, must go this length—that if a dividend were declared, every dividend coming to the British subject must be stopped, instead of being paid to him. Surely, that would be pushing the doctrine to a length wholly unwarranted by the decisions, either in *Simpson* v. *Fogo* (1), or in *Hope* v. *Carnegie* (2). The only case of duress made by the bill is this: that the Plaintiffs were obliged to give the Defendants bonds in order to prevent the Defendants doing that which was inequitable, in suing the Plaintiff's mortgagor and arresting his ship. Therefore, it is said, let the bonds be set aside. But if the Court could not have restrained the Defendants from enforcing against their debtor the remedies which were afforded them by the law of the foreign State, then their proceedings were not inequitable, there was no duress, and the grounds for relief disappear altogether.

The case is even lower than that of restraining the Defendants from suing, because, in this instance, bonds have been actually given.

What would be the consequence of the Court holding that this species of equity exists? The result would be, that the Courts of *Louisiana* would take good care that no ship hereafter should ever be released on a bond being given by a British subject. They would say, "The bond is worth nothing, for the Court of Chancery in *England* will immediately set it aside; for the ship of any other nation in the world bonds may be given, but no ship shall ever be released on the bond of an Englishman." The Plaintiffs are placed in this dilemma. Either this Court could have restrained (not the action against *Lafone*, but) the issue of execution by the Defendants against the ship, without giving credit to the mortgagee; or it could not. I do not think the Court could have restrained the execution. But, supposing it could, I apprehend the right course for the Plaintiffs to have taken would have been, before giving the bond, to have filed a bill to restrain the execution of the writs of attachment. If, as the bill states, and the demurrer admits, the only means whereby a sale could be pre-

(1) 1 J. & H. 18; 1 H. & M. 195.

(2) Law Rep. 1 Ch. 320.

vented was the giving of these bonds, then it follows that the proper course, both in law and for convenience sake, would have been to have restrained the execution of the judgment. The Plaintiffs should not have voluntarily placed themselves in a worse position. If, on the other hand, the Court could not have restrained the Defendants from attaching the ship, *à fortiori*, it cannot now prevent the Defendants from enforcing these bonds.

The case of *Talleyrand* v. *Boulanger* (1) differed from this. What was there decided was, that a foreigner has no right, as a creditor, to put in force in this country against another foreigner, his debtor, remedies which he could not have enforced in his own country upon the original contract. If the Courts of *Louisiana* had recognised the law of *England*, as, in my judgment, they were bound by the comity of nations to have done, they would have said to the Defendants, by analogy to this case, "You, being British subjects, could not have arrested this ship in this way in *England*, therefore you shall not deal with it by any such process here. You shall not put in force at *New Orleans* any remedies which you could not have put in force in *England*." As to that particular point, I remember no case involving questions respecting the law of *Louisiana*, from which it has appeared that the Courts at *New Orleans* would not possibly have so acted in dealing with British subjects. For aught that appears, they might, to the advantage of their own subjects, have put in force the principle of law which regulated M. *Talleyrand's* case by saying, "As between foreigners, our own citizens not being concerned, we will recognise English law, and deal with the case in the way in which the English Courts would deal with it." Of course I am not satisfied on this demurrer that the bill is pointed to this particular view; but it does not appear to me that the case of M. *Talleyrand* is coincident with the present, or has any bearing upon it.

The Plaintiffs' case fails, I think, upon two grounds. In the first place, the Court would not have restrained the creditor from taking out execution, because it could not have put him in the same position as the other creditors, and it would have been giving an advantage to the American creditors, to which they were not entitled; but, secondly, if it could, then the Plaintiffs should not have

(1) 3 Ves. 447.

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placed themselves in a lower position by giving the bonds, but should have come here in the first instance to have restrained the attachment. Further, by acceding to the prayer of this bill, I should be placing British subjects in a position in which it would be impossible for them to get their ships released at all. Upon all these grounds, I think there is no jurisdiction in this Court to interfere upon the case alleged by this bill.

A special ground of relief was alleged, in the form of a sort of contract, that these parties would not avail themselves of the law of *Louisiana*. But as to that, the case stands thus: *Lafone*, the mortgagor, being about to consign this ship to the Defendants at *New Orleans*, took an engagement, as the bill states, from their *Liverpool* agents, that the *New Orleans* firm would not enforce the peculiar law of *Louisiana*, but would pay the money over to the mortgagees. Now, it is to be observed that the mortgagees were no parties to that contract; the utmost that can be said is, that *Lafone* gave his creditors notice of the mortgage. Even if there had been a contract with the mortgagees, it was broken; because it was in consideration of the consignment of the ship by their agents, that the *New Orleans* firm entered into this engagement with *Lafone*, and this consideration failed when the ship was consigned by other consignors. This special ground of relief therefore fails entirely.

The question is reduced to this—Whether it is so inequitable that English creditors, who are British merchants, and now domiciled here, should avail themselves in common with Americans and others in *New Orleans* of the remedies afforded by the law of *Louisiana*, against their debtors' property, that I should restrain them from proceeding on these bonds. I hold that is not the case, and therefore the only thing I can do, is to allow the demurrer. There will be no order on the motion, except that the Plaintiffs pay the Defendants' costs of the motion.

Mr. *Robinson* stated that, whether or not in consequence of His Honour's decision in *Simpson* v. *Fogo* (1), it was the fact that only since that case was decided had the Courts of *Louisiana* permitted ships to be released on the bond of the mortgagee.

(1) 1 J. & H. 18; 1 H. & M. 195; 6 Jur. N.S. 949. 9 L. 403.

SIR W. PAGE WOOD, V.C.:—

In that case, the Courts at *New Orleans* would not allow the mortgagee to give a bond; they said he was a total stranger, and it was only upon the bond of the debtor that the ship could be released.

Solicitors for the Plaintiffs: Messrs. *Chester & Urquhart*, agents for Messrs. *Lace, Banner, & Co., Liverpool.*

Solicitors for the Defendants: Messrs. *Field, Roscoe, & Co.*, agents for Messrs. *Bateson, Robinson, & Morris, Liverpool;* Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Hull, Stone, & Fletcher, Liverpool.*

LUCAS *v.* JONES.

9 Geo. 2, c. 36—Charity—Mortmain—Impure Personalty—Conversion.

A., being entitled to moneys charged upon land, but primarily secured by bond and promissory notes, bequeathed all her property to her three daughters, *B.*, *C.*, and *D.*, whom she appointed executrixes of her will.

B. died in the lifetime of *A.*, and *C.* died intestate shortly after *A.*'s death, and *D.* became sole executrix of *A.*, and alone entitled to the said moneys. The moneys were not called in during the life of *D.*, who, by her will, gave legacies to charities:—

Held, that as *D.* was alone entitled to the property, the Court would not assume in favour of the charities a conversion into pure personalty, which she was not bound to make.

Shadbolt v. *Thornton* (1) disapproved.

THIS case came on upon further consideration, together with a motion to vary the Chief Clerk's certificate, by which several items, amounting to a sum of £98 18*s.* 3*d.*, were found to be the only parts of the estate of the testatrix, *Mary Margery Prosser*, applicable to the payment of charitable legacies.

Anne Prosser the elder, by her will, dated the 2nd of March, 1857, after giving a pecuniary legacy, gave, devised, and bequeathed all her real and personal estate unto and to the use of her three daughters, *Anne*, *Mary Margery*, and *Sarah*, their exe-

(1) 17 Sim. 49 (more fully reported in 13 Jur. 597).

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cutors, administrators, and assigns, absolutely for ever, in equal shares, as tenants in common, and appointed her three said daughters her executrixes.

Anne Prosser the elder, died on the 5th of September, 1861, and her will was proved on the 4th of March, 1862, by *Mary Margery Prosser*, who, by the death of her sisters (*Sarah*, in December, 1859, and *Anne*, intestate, on the 3rd of January, 1862), became sole executrix, and was also sole next of kin of her mother, and her sister *Anne*.

Mary Margery Prosser, by her will, dated the 21st of January, 1862, gave several sums to different charitable institutions, with a direction that the legacies for charitable purposes should be paid exclusively out of such part of her personal estate as might lawfully be appropriated to such purposes, and preferably to any other payment thereout. In addition to the items, amounting to £98 18*s.* 3*d.*, *Mary Margery Prosser* died possessed of the undermentioned personal estate, derived partly from her mother, *Anne Prosser* the elder, and partly as sole next of kin of her sister, *Anne Prosser* the younger, viz.:—A bond debt of £2000 due to *Anne Prosser* the elder, by *Lewis Morris*, such debt being further secured by a deposit of title deeds relating to *Lewis Morris's* freehold estates with Mrs. *Prosser's* solicitor; £1100 due to Mrs. *Prosser* by one *Vaughan*, and secured by a mortgage of freehold estate; £300 due to Mrs. *Prosser* by one *Harris*, also secured by mortgage; £700 secured by promissory note, and further secured by a deposit of title deeds of real estate.

The Chief Clerk having certified that these last-mentioned items were not applicable to the payment of the charitable legacies, a summons to vary the certificate had been taken out by the charitable legatees, which was adjourned into Court.

Mr. *Kenyon*, Q.C., and Mr. *C. C. Barber*, for the charitable legatees:—

It was the duty of the executors of *Anne Prosser* to have realised the securities, and the property must be considered as impressed with the character (pure personalty) which it would have borne if the executors had performed their duty and converted it into cash, and such breach of duty cannot be allowed to invalidate the

charitable bequests: *Shadbolt* v. *Thornton* (1); *Marsh* v. *Attorney-General* (2); *Jeffries* v. *Alexander* (3). In the case of these securities the bond or promissory note constituting a simple contract debt is the primary charge, and the decisions upon the *Statute of Mortmain* (the main object of which was to prevent the inalienability of land consequent upon the creation of charitable uses) have not "gone to the length of establishing that a disposition of property for charitable purposes would be void, because real estate or chattels real might or would be affected by the remedies which the law gives for the recovery of such property:" *Alexander* v. *Brame* (4); and the option to deal with the property in a manner which is not obnoxious to the statute, renders the gift to charity of such property valid: *Sorresby* v. *Hollins* (5); *Copis* v. *Middleton* (6); *Graham* v. *Paternoster* (7).

[They also referred to *Myers* v. *Perigal* (8); *Edwards* v. *Hall* (9); *Foone* v. *Blount* (10); *Aspinall* v. *Bourne* (11); *Re Mockett's Will* (12).]

Mr. *G. M. Giffard*, Q.C., and Mr. *Freeling*, for the residuary legatees:—

With respect to *Shadbolt* v. *Thornton*, search has been made in the Registrars' office, and it appears that it was heard as a short cause. It cannot be reconciled with *Attorney-General* v. *Harley* (13), or with *Lady Langdale* v. *Briggs* (14), and is not law.

The principle established by the cases is, that where there is a direction to convert the property which is afterwards the subject of a charitable bequest, and the conversion will be for the benefit of one individual (the charitable testator), the charitable legatees cannot take, as they would have a right (independently of the *Statute of Mortmain*) to elect to take the property in its unconverted state. *Secus* where the conversion will be for the benefit of a class. In this case *Mary Margery Prosser* was absolutely en-

(1) 17 Sim. 49 (more fully reported in 13 Jur. 597).
(2) 2 J. & H. 61; 7 Jur. N.S. 184
(3) 8 H. L. C. 594; 7 Jur. N.S. 221
(4) 7 D. M. & G. 525, 542; 1 Jur. N.S. 1033, 1036
(5) 9 Mod. 221.
(6) T. & R. 224.
(7) 31 Beav. 30; 8 Jur. N.S. 127
(8) 2 D. M. & G. 599; 17 Jur. 145.
(9) 11 Hare, 1; 6 D. M. & G. 74, 84, 88; 17 Jur. 593. 1 C.W.; 1 Jur. N.S. 1189 &c
(10) Cowp. 464.
(11) 29 Beav. 462.
(12) Joh. 628; 6 Jur. N.S. 142.
(13) 5 Madd. 321.
(14) 8 D. M. & G. 391 (see p. 413); 2 Jur. N.S. 982

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titled to the whole of these assets, which remained unconverted at her death, and cannot now be treated as pure personalty so as to entitle the charitable legatees to take.

Mr. *Kenyon*, in reply.

SIR W. PAGE WOOD, V.C.:—

The question is, whether *Shadbolt* v. *Thornton* (1) is a binding authority; as, independently of that case, which I confess goes too far, it is impossible, upon the authorities, to hold that the property in question, which consists of debts secured by a deposit of title deeds and other mortgages, can be given to charity. The result of holding that mortgages could be given to charities under the statute would be, that charities would be enabled to foreclose the mortgage or realise the security, which would be the same thing as allowing them to have a charge upon the land, and would clearly be an evasion of the *Mortmain Act*. The unpaid interest of a mortgage is also, like the principal, enforceable against the mortgaged lands. The property in question is therefore clearly within the provisions of the *Mortmain Act*.

The case is, so far, more adverse to the claim of the charities that at the date of her will *Mary Margery Prosser* seems to have had the whole beneficial interest in her mother's property, and was also her mother's surviving executrix, so that she had the whole legal and equitable interest, subject to her mother's debts. It was contended that it was her duty as executrix to have called in her mother's property and divided the proceeds, but considering that she had the whole beneficial interest, what purpose was there for a conversion, except for the sake of paying any debts that might have been owing from the mother's estate? At the same time *Shadbolt* v. *Thornton* goes a long way; and in holding that the property remains in the same state in which it came from the first testatrix, I feel that I am deciding contrary to that authority.

The principle seems to be this, that if any person by whose will gifts in favour of charities are made, has the sole control of property which is obnoxious to the *Mortmain Act* then the property must be taken in the shape in which it is found; but if, on the

(1) 17 Sim. 49 (more fully reported in Jur. 597).

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other hand, the property is directed to be sold, and the proceeds divided between several persons, inasmuch as the second testator has not the whole control over the property, and is not entitled to deal with it *in specie*, it must be regarded as converted, and in the form of money.

The case is analogous to those between heir-at-law and next of kin, where, as was observed by Lord *Eldon* in *Wheldale* v. *Partridge* (1), the question depends "not upon the equity between the heir and the executor, but whether the money was at home" (2).

Here the property was "at home" with the testatrix, and nothing that was afterwards done can affect the question. I cannot call in this property, and treat it as converted, as I am asked to do by the charities, and I am therefore bound to hold that the certificate of the Chief Clerk is right. I do not, however, make the claimants, who have *Shadbolt* v. *Thornton* in their favour, pay any costs.

Solicitors: Mr. *T. Clark*; Messrs. *Dobinson & Geare*.

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V.-C. W. 1867 April 26, 29.

Arbitration—Agreement to make Submission a Rule of Court—Appointment of Arbitrators—Suit in Equity—Plea of Submission—Covenant not to sue—Common Law Procedure Act—Jurisdiction of Superior Court—Amendment of Plea.

An agreement to submit the affairs of a partnership to arbitration, and that the submission shall be made a rule of a Court of common law, cannot be pleaded in bar to a suit in equity, seeking discovery, complaining of the Plaintiff being sued in actions, and praying for a receiver; although before the bill was filed arbitrators were appointed, and since bill filed, the submission has been made a rule of the Court.

The jurisdiction of the superior Courts in such a case is not ousted by the provisions of the *Common Law Procedure Act*.

If the agreement to submit also contains a covenant not to take proceedings at law or in equity, whether in that case the submission may be pleaded in

(1) 8 Ves. 227. (2) See 8 Ves. pp. 235, 236.

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bar of proceedings in any superior Court, except that before which the reference is pending, *quære.*

Observations on *Dimsdale* v. *Robertson* (1).

Where, in a reference under the *Arbitration Act* of Will. 3, an award has been made, the jurisdiction in the matters of the award of every superior Court, except that before which the reference is pending, is excluded.

Leave may be given to amend a plea of submission, under special circumstances.

THIS was a plea.

The Plaintiff and Defendant, in 1856, entered into partnership as attorneys and solicitors; and by an agreement, dated the 28th of February, 1865, they mutually agreed to dissolve the partnership as and from the 1st of January preceding. The agreement contained the following clauses relating to arbitration:—

"And it is hereby further declared and agreed that all questions relating to the said co-partnership be referred to the award, arbitrament, and final determination of *Richard Helps*, of the city of *Gloucester*, Esq., nominated by and on behalf of the said *Philip John William Cooke* (the Defendant), and *Thomas Taynton*, of the city of *Gloucester*, Esq., nominated by and on behalf of the said *Charles James Cooke* (the Plaintiff), to award, order, arbitrate, judge, and determine, of and concerning the co-partnership premises, or anything relating thereto, and also of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, securities, covenants, contracts, promises, acts, reckonings, sums of money, claims, and demands whatsoever, both at law and in equity, or otherwise howsoever, at any time heretofore up to and upon the 1st day of January last, had made, done, moved, brought, commenced, sued, committed, or depending by or between the said parties of or concerning, or in any way concerning, the said co-partnership, or in relation thereto; and in case such arbitrators shall not agree, then the said parties hereto shall and will stand to obey, abide by, observe, perform, fulfil, and keep the award, order, umpirage, and final determination of *William Henry Gwinnett*, of *Cheltenham*, Esq., a person indifferently chosen by the said parties for umpire in or concerning the premises, so as the said award be made in writing

(1) 2 J. & Lat. 58.

under the hands of the said *Richard Helps* and *Thomas Taynton*, or such award and umpirage be made under the hand of the said *William Henry Gwinnett*, ready to be delivered to the said parties hereto, or either of them, before or on the 28th day of February now next ensuing, or before or on such other day as the said arbitrators or umpire, by any writing under their or his hand, to be indorsed on these presents, from time to time appoint: And it is hereby agreed by and between the said parties hereto that these presents and the submission hereby made shall be made a rule of Her Majesty's Court of Queen's Bench: And it is hereby agreed and declared that the said arbitrators and umpire respectively shall have power to examine the parties, and to call for books, deeds, writings, vouchers, and evidence, in the power of either of the parties: And further, that if the said accounts relating to the said partnership shall not be mutually settled between the said parties hereto upon the application of one or the other of them, then for the said arbitrators or umpire to direct the mode in which, and the person or persons by whom, such accounts are to be wound up and settled, and the partnership credits realized; also the division or application thereof, and the payment of the liabilities of the said partnership; also the doing any acts, and the signature, execution, and perfecting any notices, deeds, documents, or writings, as the said arbitrators or umpire may deem requisite or expedient in the premises: And it is hereby agreed that the costs of this reference and of the said award or umpirage shall be paid out of the partnership assets in equal proportions, and that the said award or arbitrament shall be applicable and binding, although all or any of the said parties shall have departed this life previously to the making of such award; and further, that the arbitrators or umpire, as the case may be, may from time to time make their or his award upon any question or questions in dispute that may then have arisen, and shall not be deemed or taken to have ceased to have authority by so doing until all matters relating to the premises shall have been finally disposed of."

On the 23rd of February, 1866, the arbitrator enlarged the term for making the award to the 29th of September following.

On the 21st of December, 1866, the Plaintiff filed the present bill, alleging that the time had been enlarged as above men-

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tioned, but that "no award has ever been made under the said agreement, and there has been no further extension of the time for making the award;" also that "various questions which have arisen between the Plaintiff and Defendant have been referred to the said arbitrators, pursuant to the agreement, but no award has been made by them thereon;" also that "the books of accounts and securities relating to the said partnership are in the possession of the Defendant, and the Plaintiff is unable to obtain the same;" also that "difficulties have arisen in winding up the affairs of the said partnership, and in settling the accounts thereof, which cannot be conveniently or properly referred to arbitration pursuant to the provisions of the agreement, even if (which the Plaintiff charges cannot now be done) the time for making an award could be further enlarged;" also that the Plaintiff was being sued by creditors of the firm.

The bill prayed for an account of all dealings, and of the credits of the partnership, and, if necessary, for a receiver.

On the 11th of February, 1867, the submission was, on the application of the Defendant, made a rule of the Court of Queen's Bench; and on the 15th of February the Defendant obtained an order from Mr. Justice *Lush*, extending the time for making the award to the 30th of March.

On the 17th of February, Mr. *Helps*, the Defendant's arbitrator, died.

On the 19th of February the Defendant filed the present plea to the whole bill, whereby he pleaded the agreement to submit; also the *Arbitration Act* (9 & 10 Will. 3, c. 15, s. 1), and the *Common Law Procedure Act*, 1854 (17 & 18 Vict. c. 125, s. 17); and that the submission had been made a rule of Court; also that "the Court of Queen's Bench is the only Court which has any jurisdiction in relation to the said submission, or to the matters thereby referred to arbitration;" and that "this honourable Court has not any jurisdiction in relation to the said submission, or to the said matters thereby referred to arbitration." The Defendant also thereby averred that the arbitrators duly entered upon the arbitration of the matters in difference referred to them; and that the time for making the award had been enlarged to the 30th of March; that the submission was a valid and subsisting submission

of the matters in difference which were referred, "being all the matters in difference between this Defendant and the Plaintiff in relation to the partnership;" and "being all the matters in respect of which relief is sought by the bill;" and that all the matters referred were fit matters to be determined by arbitration.

On the 23rd of March, a new arbitrator was appointed, and on the 27th of March the time for making the award was, on the Defendant's application, again extended by the arbitrators to the 29th of September, 1867.

In this state of things, the plea having been set down, but not yet heard, the Defendant, on the 15th of April, moved for leave to amend; and His Honour, after argument, granted leave. The plea was accordingly amended by averring the death of the arbitrator, and appointment of the new arbitrator, and the further extension of time; and now came on for hearing.

Mr. *W. M. James*, Q.C., and Mr. *Bovill*, for the plea:—

No such state of things arises here as occurred in *Wood* v. *Robson* (1), where the plea of a submission was overruled on the ground that the arbitration could not have covered all the matters in suit. Here the plea expressly avers that the submission was in respect of all the matters in which relief is sought by the bill. The leading authority on this subject in modern times is *Dimsdale* v. *Robertson* (2), in which Lord *St. Leonards* supported *Halfhide* v. *Fenning* (3), and said he was prepared to act upon Lord *Kenyon's* reasoning in that case. That reasoning is perfectly applicable here, though there is no covenant not to sue, as in those two cases.

The terms of the 3 & 4 Will. 4, c. 42, s. 39, providing that an arbitrator's powers (where the submission is within the statute of Will. 3) shall not be revocable "without leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission," shew that the Legislature contemplated that matters once in arbitration should be left to the Court before which the reference is pending.

In this case no partial or subsidiary relief can be obtained by

(1) Vice-Chancellor *Wood*, Feb. 8, 1867.

(2) 2 J. & Lat. 58, 91.

(3) 2 Bro. C. C. 336; 2 Dick. 702.

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the bill. If at all, the whole agreement to submit must be overruled. This would be contrary to principles of equity.

The bill was, in fact, filed in mistake. The Plaintiff supposed that the time could not be extended, and that the whole arbitration had come to an end. But the *Common Law Procedure Act* enables the submission to be made a rule of Court on the application of either party. When that has been done, we say that, where the submission is statutory, the jurisdiction of this, or any other of the superior Courts (except that of which the submission is made a rule), is at an end. That is the result of the two statutes, the Act of Will. 3, and the *Common Law Procedure Act*, taken together.

Even before the *Common Law Procedure Act*, this was the result, where an award had been actually made: *Dawson* v. *Sadler* (1); *Nichols* v. *Roe* (2); *Heming* v. *Swinnerton* (3); *Smith* v. *Whitmore* (4).

This plea rests, therefore, on the established rule (5) that, although the subject of the suit may be within the jurisdiction of a Court of Equity, yet when this Court has not the proper jurisdiction, the Defendant may plead the matter which deprives the Court of jurisdiction.

Kill v. *Hollister* (6), and *In re Warner and Powell's Arbitration* (7) also apply.

Mr. *Kay*, Q.C., and Mr. *Freeman*, for the bill:—

The plea is no answer to the bill. The Plaintiff alleges that he is unable to obtain the books of account and securities of the partnership; that he is harassed by actions; in other words, that he is unable to get the relief he seeks except in this Court. He makes a special case for relief; as in *Cook* v. *Catclipole* (8), where one partner charged another with fraud, and an application by a third partner, under the *Common Law Procedure Act*, for an order to refer (the submission having been agreed to be made a rule of this Court) was refused.

In this instance it was not until after the bill was filed that the Defendant revived his powers of arbitration, and made the submis-

(1) 1 S. & S. 537, 540.
(2) 3 My. & K. 431.
(3) 2 Ph. 79; S. C. 1 Coop. C. C. 386, 413.
(4) 1 H. & M. 576; see p. 589; 2 D. J. & S. 297, 10 Jur. N.S. 1190.
(5) Mitford, Pl. p. 262, 4th Ed. 223.
(6) 1 Wils. C. P. 129.
(7) Law Rep. 3 Eq. 261.
(8) 13 W. R. 42, 10 Jur. N.S. 1060.
10 Jur. N.S. 565.

sion a rule of Court. So that his proceedings are a mere device. He attempts to withdraw from the jurisdiction of this Court a suit for taking accounts and appointing a receiver by averring that some time previously to the suit an arbitration was commenced, which came to nothing.

The dictum in *Kill* v. *Hollister* (1) was not followed in *Thompson* v. *Charnock* (2). In *Halfhide* v. *Fenning* (3) there was an express covenant that there should not be any suit at law or in equity. That was the express ground of Lord *Kenyon's* decision, as is recognised by Lord *St. Leonards* in *Dimsdale* v. *Robertson* (4). The case, moreover, was disapproved by Lord *Eldon* in *Street* v. *Rigby* (5), except in so far as it went upon the covenant, as to which the Lord Chancellor said he would give no opinion. In this case there is nothing like a covenant not to sue.

That arbitration clauses in leases will not oust the jurisdiction of this Court was laid down by Lord *Langdale* in *Earl of Mexborough* v. *Bower* (6); and in this branch of the Court in *Croskey* v. *European and American Steam Shipping Company* (7). Courts of law have supported the same principle recently in *Thompson* v. *Charnock*, and *Horton* v. *Sayer* (8).

Whenever a plea has been allowed, it has been in cases where the agreement is of such a kind as that, until the arbitrators have agreed upon some sum, there is no contract, and no cause of action. That is the principle of *Scott* v. *Avery* (9), and *Scott* v. *Corporation of Liverpool* (10).

Harris v. *Reynolds* (11); *Wood* v. *Copper Miners' Company* (12), also apply.

If this bill be stopped, neither the Plaintiff nor the Court has any security that the matters will ever be settled. If the Defendant had been sincerely desirous to go on with the arbitration, he might have applied to this Court to stay proceedings in the suit under the 11th section of the *Common Law Procedure Act*.

(1) 1 Wils. C. P. 129.
(2) 8 T. R. 139.
(3) 2 Bro. C. C. 336; 2 Dick. 702.
(4) 2 J. & Lat. 58.
(5) 6 Ves. 815, 821.
(6) 7 Beav. 127, 132.
(7) 1 J. & H. 108, 6 Jur. N.S. 1190
(8) 4 H. & N. 643; 5 Jur. N.S. 989.
(9) 5 H. L. C. 811; 2 Jur. N.S. 815.
(10) 3 De G. & J. 334; 5 Jur. N.S. 105
(11) 7 Q. B. 71.
(12) 17 C. B. 561.

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Mr. *James*, in reply:—

This is not a case in which, as it was put in the old authorities, the Defendant is trying to shew that the Plaintiff has contracted himself out of a right to sue in equity. There is no case in which, after a statutory submission, and rule of Court duly made, followed by appointment of arbitrators and umpire, a bill has ever succeeded, except on some special ground, such as fraud, unfitness on the part of the arbitrators, or the like.

The special case made here is of the vaguest kind. "That there has been no enlargement of time;" but that is the very accident which the Legislature has remedied by giving to either party power to enlarge the time. "That the books of account and securities are in the hands of the Defendant:" that is quite consistent with the plea, because the arbitrators alone have the right of using them. "That difficulties have arisen in winding up the affairs of the partnership, and in settling the accounts, which cannot be conveniently or properly referred:" but there is no statement of any such difficulties as cannot be surmounted by arbitration.

The principle of the decisions in all those cases in which there was a prospective agreement to submit is, that it is inconsistent to allow the parties to go to another tribunal. Suppose the arbitrators should decide one way, and this Court another, such a conflict could not be referred to the Court of law, for the agreement could not be pleaded at law. All that could be done would be to come back to a Court of Equity.

In *Wood* v. *Copper Miners' Company* (1), the decision of the Court seemed to be, not that the plea was bad, but that, whether good or bad, the replication was an answer to it. In *Harris* v. *Reynolds* (2), there was a covenant that the submission should not be made a rule of Court, which is an exception.

The tendency of legislation has been to give every possible encouragement to arbitrations; and one of the first principles of this Court is to compel parties to the fulfilment of their engagements.

Sir W. Page Wood, V.C.:—

I should have taken more time to consider this case, with refer-

(1) 17 C. B. 561. (2) 7 Q. B. 71.

ence to Lord *St. Leonards'* decision in *Dimsdale* v. *Robertson* (1), had I not had an opportunity of considering it since the plea was first opened. I now feel by no means satisfied that there is anything in *Dimsdale* v. *Robertson* to justify me in saying, in this case, that the exclusive jurisdiction of one of the superior Courts, founded on a reference to arbitration, and followed by the appointment of arbitrators and the making of the submission a rule of Court, can be sustained, where no award has been actually made.

In *Dimsdale* v. *Robertson*, Lord *St. Leonards* felt considerable difficulty in contending with a stream of authority of great force, in which several learned Judges, including Lord *Eldon*, without actually overruling *Halfhide* v. *Fenning* (2), expressed strong doubts as to the soundness of the principle involved. He preferred, however, following Lord *Kenyon's* decision. It is true that the particular covenant not to sue, or proceed to take any remedy other than that specifically pointed out by the agreement, which occurred in both those cases, does not exist in the case before me; but Lord *St. Leonards* relied upon other points which do exist in the present case. He observed that the decisions of the Judges subsequent to *Halfhide* v. *Fenning*, turned in a great measure on the want of power in the arbitrator to take the examination of witnesses on oath, to compel the appearance of witnesses, the production of papers, and the like; and then proceeded to remark that, through the medium of the agreement and the operation of law, those difficulties had, in the case before him, been removed. Accordingly, it was impossible for the parties to say they had chosen a tribunal incompetent to render them complete justice; and there was nothing to induce the Court to say that its own supreme jurisdiction must continue unimpaired, in consequence of the imperfections of the subordinate tribunal created by the agreement.

These observations of Lord *St. Leonards* have been commented on by the present Lord Chancellor in *Scott* v. *Corporation of Liverpool* (3), which fell within the principle of *Scott* v. *Avery* (4), a simple case, where a contractor had agreed that he should be paid only what the engineer should certify, and it was held that there

(1) 2 J. & Lat. 58.
(2) 2 Bro. C. C. 336.
(3) 3 De G. & J. 334.
(4) 5 H. L. C. 811.

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was no right of action until the certificate was made. But the Lord Chancellor distinguishes that simple class of cases from the other, where a distinct right, such as a debt, or an obligation to account, has arisen, and the parties have agreed upon a particular private tribunal which shall adjust the right for them. Speaking of the latter class of cases, the Lord Chancellor says (p. 360) :—"A right of action has accrued, and it would be against the policy of the law to give an effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals."

This proposition seems to be established by a series of authorities, at the head of which is *Thompson* v. *Charnock* (1). But it is impossible to pass over the decision in *Dimsdale* v. *Robertson* (2), both on account of the high authority of the Judge by whom it was decided, and because it seems to have been entirely overlooked in the discussion of several similar cases. In that instance, Lord *St. Leonards*, after reviewing the authorities on the subject, arrived at a conclusion apparently at variance with them. In the view which I have taken of this case, it is unnecessary for me to consider the propriety of the decision in *Dimsdale* v. *Robertson;* but I cannot forbear remarking that the circumstances upon which Lord *St. Leonards* relied, as giving greater effect to the agreement to refer in that case, namely, the power to make the submission a rule of Court, and the legislative authority given to arbitrators of examining witnesses on oath, hardly appear sufficient to distinguish the case from others in which these conditions are not found; because these provisions are mere directions as to the mode in which the reference is to be conducted, or means for enabling the parties to give greater efficacy to it, by suing out attachment for disobedience, and do not operate until the case has been withdrawn from the action of the regular tribunals—a withdrawal which, according to the earlier decisions, the parties have no power to effect.

We find, then, a long series of decisions anterior to *Dimsdale* v. *Robertson*, which determine this—that an agreement to refer does not oust the ordinary jurisdiction of the Court. We further find the authority of *Halfhide* v. *Fenning* (3) saying this—that a special covenant not to sue *may* make a difference; but that question

(1) 8 T. R. 139. (2) 2 J. & Lat. 58.
(3) 2 Bro. C. C. 336.

remains *in dubio*. In that state of the authorities, the *Common Law Procedure Act* was passed. That statute, as the Lord Chancellor has observed, gave to the mode of procedure a great many facilities which it did not possess before. But, it is to be observed that, with that question—whether an agreement for submission, which also contains a covenant not to sue, does, or does not, exclude the jurisdiction—still remaining undecided, the Legislature has not thought fit, in the *Common Law Procedure Act*, to say that the jurisdiction of this or of any other Court shall be ousted by the mere pendency of the reference. If any one thing be better established than another, it is this—that the jurisdiction of one of the higher Courts, if it exists, cannot be ousted, except by express enactment. That jurisdiction, therefore, existing in spite of any agreement to refer, the circumstance that the Legislature, whilst acting on a number of agreements to refer, and making them more effectual, has avoided declaring that the jurisdiction of the ordinary Court shall be superseded by them, or that they may be pleaded in bar to ordinary proceedings, affords a strong reason for concluding that the jurisdiction of the ordinary tribunals remains unaffected by the statute, unless, indeed, the case can be brought within the principle of *Halfhide* v. *Fenning* (1).

But the case does not rest there; because the Legislature, having the whole subject before it, by the 11th section has enacted that, where there is an agreement to refer, either party, if vexed by an action or suit in a Court of law or equity, may apply to that Court to know whether its jurisdiction is, or is not, properly ousted by the agreement. Thus the Legislature deals with this very subject. It does not take the step of ousting the jurisdiction, and saying it shall be concluded; but it directs an application to be made to the Court, in order that, having the consideration of the whole matter before it, the Court may exercise its own discretion as to whether the suit or action shall proceed. This section, therefore, is an authority for saying that a mere agreement to refer, although followed by the appointment of arbitrators, no award having been made, shall not conclude the jurisdiction of the higher tribunal.

Further than that, as long since as the Act of Will. 3, the Legislature has declared that "when the award has been made"

(1) 2 Bro. C. C. 336.

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the jurisdiction of every tribunal shall be ousted, except that of the Court before which the award is pending in the shape of a rule of Court. That Court alone may, upon sufficient reasons appearing, judge of the sufficiency of the award. It is easy to see the reason for this: but to allow a plea in bar of an action or suit pending a reference, which may never end in any award after all, would be contrary to common sense.

I was pressed with the consideration of what would follow if the arbitrators were to make their award, and the Court should come to a conclusion different from theirs. But, on the other hand, I have to consider what must follow if this plea should be allowed, and the Plaintiff sent away without remedy. If that were to take place, I am not aware that there is any jurisdiction upon which he can proceed, or any means by which justice can be done him. I have no means of compelling the arbitrators or the umpire to proceed; and although application may be made to the Court before which the reference is pending, I am not aware that there is any power of compelling arbitrators to proceed if they cannot agree, or of compelling the umpire, if he shall find himself in any difficulty, to come to a decision.

The case somewhat resembles that of concurrent jurisdiction. Formerly, when the Court of Exchequer had a jurisdiction in equity, a bill might have been filed in Chancery, and when a decree had been obtained, it might have been pleaded in bar to the suit in the Exchequer, but up to the decree either side went on as it best might. The powers which are given to arbitrators cannot be put higher than this concurrent jurisdiction, which formerly existed in the Courts of Exchequer and Chancery.

It was argued, however, that this Court ought to hold parties to their agreements; and that these parties having agreed that the domestic *forum* shall be their tribunal, this Court ought not to allow them to withdraw from their agreement, and substitute another tribunal. But then the authorities say that an agreement to refer to a *forum domesticum* is not such an agreement as ought to oust the jurisdiction of the superior Court—at least, not in a case where there is not, as there was in *Dimsdale* v. *Robertson* (1), an express covenant not to sue.

(1) 2 J. & Lat. 58.

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I have been very anxious to have this case heard on its full merits, though there may be points of difference in it, which might justify me in deciding it on the narrower ground of the special facts which exist here. But I allowed an amendment to this plea—perhaps going a long way in so doing—in order that I might have the whole case clearly raised.

The circumstances were these:—When the bill was filed, in December, 1866, there was indisputably jurisdiction in this Court; because, as was truly alleged, the agreement to submit was made as long before as in February, 1865, nearly two years previously, and nothing had been done under that agreement. In September, 1866, the time for making the award had expired, and no steps had been taken to enlarge the time. The bill also alleged that in that state of things no award could be made, that the Plaintiff was exposed to various inconveniences, that the Defendant had all the books and papers in his custody, that they were out of his reach, that he was being sued by creditors of the firm, and that a receiver was required for administering the affairs of the partnership. Then the plea avers that the submission has been made a rule of Court—but not until February, 1867—and that the time has been since extended. It happened, unfortunately, from the amount of business in this Court, that before the plea could be heard, a new arbitrator had been appointed in place of one who had died, and the time for making the award had to be still further extended. It became necessary to bring those facts before the Court; and I allowed the plea to be amended for that purpose.

I doubt very much whether, in that state of circumstances, and with the averments that are contained in this bill, there would not be a good special answer to a plea of this description. But I prefer resting the case on the broad ground, that it is no bar to a suit of this kind to plead that there is a reference pending, which may, or may not, ultimately result in an award being made.

The plea must, therefore, be overruled, with the usual consequences.

Solicitors for the Plaintiff: Messrs. *Rogerson & Ford.*
Solicitor for the Defendant: Mr. *James M. Weightman.*

V.-C. W.
1867
May 4.

GALLOWAY *v.* CORPORATION OF LONDON.

Solicitor and Client—Costs—Agreement—Fixed Yearly Salary to Solicitor.

An agreement between a client and a solicitor that the solicitor shall be paid a fixed yearly salary, to be clear of all expenses of his office, and to include all emoluments, he paying to the client any surplus which may arise of receipts over payments, is not opposed to the provisions of the Attorneys and Solicitors Acts, nor to the policy of the law, where it is also a term of the agreement that the solicitor is not to transact professional business for any other client.

If a client and his solicitor were to agree that the solicitor should be paid a fixed salary, and should receive no costs beyond disbursements—whether an adverse party in a suit, on being ordered to pay costs, could be compelled to pay the client any costs beyond the solicitor's disbursements—*quære*.

THIS was an application by adjourned summons on the part of the Plaintiff, that the Taxing Master might be ordered to review his taxation of the Defendants' costs in respect of items to which the Plaintiff had carried in objections, which had been disallowed.

The Plaintiff had filed a bill against the Corporation of *London*, and, after a considerable litigation, his suit, on appeal to the House of Lords, was dismissed with costs. The Taxing Master, by his certificate, had, in effect, allowed to the corporation almost all the costs of the litigation; and the Plaintiff contended that all these costs ought to be disallowed.

He deposed that the City Solicitor was a salaried officer of the corporation, and that in consequence of this arrangement the corporation were in the position of a person unqualified to act as a solicitor within the *Attorneys Act* of 1843 (1): and that by the

(1) The 6 & 7 Vict. c. 73, s. 32, enacts as follows:—"That if any attorney or solicitor shall wilfully and knowingly act as agent in any action or suit in any Court of law or equity, or matter in bankruptcy, for any person not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be anyways made use of in any such action, suit, or matter, upon the account or for the profit of any unqualified person, or send any process to such unqualified person, or do any other act thereby to enable such unqualified person to appear, act, or practise in any respect as an attorney or solicitor in any suit at law or in equity, knowing such person not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to any of the said superior Courts wherein such attorney or solicitor has been admitted, and proof made thereof upon oath to the

Attorneys Act of 1860 (1), an unqualified practitioner is not entitled to fees, charges, or disbursements.

It was not, however, now sought to disallow to the Defendants the disbursements to which they would be entitled suing as private persons, *i.e.* costs out of pocket.

From the affidavit of Mr. *Thomas James Nelson*, the City Solicitor, it appeared that the terms of his appointment were contained in a report of the Officers and Clerks Committee of the corporation, dated the 20th of November, 1862, which was subsequently agreed to by the Court of Common Council.

The material portions of this report were the following:—

"Attaching very considerable importance to the last clause of the suggested duties which provides, 'that the City Solicitor be not permitted to hold any other appointment whatsoever, nor to engage in the transaction of professional business for or on behalf of any other parties than the corporation, but that his time and

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satisfaction of the Court that such attorney or solicitor hath wilfully and knowingly offended therein as aforesaid, then, and in such case, every such attorney or solicitor so offending shall and may be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said Court to commit such unqualified person so acting or practising as aforesaid to the prison of the said Court, without bail or mainprize, for any term not exceeding one year."

(1) The 23 & 24 Vict. c. 127, s. 26, is as follows:—"Every person who acts as an attorney or solicitor contrary to the enactment in sect. 2 of the first hereinbefore-mentioned Act, or who, in his own name, or in the name of any other person, in anywise acts as a proctor in or with respect to any proceedings in the Court of Probate, or of the Court for Divorce and Matrimonial Causes, without being duly qualified so to act, shall be deemed guilty of a contempt of the Court in which the action, suit, cause, matter, or proceeding, in relation to which he so acts, is brought, had, or taken, and may be punished accordingly, and shall be incapable of maintaining any action or suit for any fee or reward for or in respect of anything done or any disbursement made by him in the course of so acting, and shall, in addition to any other penalty or forfeiture, and to any disability to which he may be subject, forfeit and pay for every such offence the sum of £50, to be recovered, with full costs of suit, by action brought, with the sanction of Her Majesty's Attorney-General, in the name of the *Incorporated Law Society*, in any of the superior Courts of law at Westminster, or in any County Court, and such penalty shall be applied in like manner as fines imposed for practising without a stamped certificate are now by law applicable."

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attention be at all times exclusively devoted to the business connected with his office,' we have felt that the income of the City Solicitor should be commensurate with that officer's position, and further, that it should not be subject to fluctuation arising from the varied amounts of his professional charges, but that it would be most desirable to fix the same at a definite amount.

"Under all the circumstances, therefore, we beg leave to recommend:

"That the City Solicitor should be allowed an income of £1250 per annum, the same to be clear of all expenses of his office, and to include all emoluments whatsoever.

"That arrangements similar to those now in force with regard to the office of Comptroller should be made, viz.:—

"That the City Solicitor shall be authorized to draw from the Chamber, at the end of every quarter, the sum of £200, on account of current expenses.

"That the City Solicitor be required to deliver into this Honourable Court, after Midsummer and Christmas every year, a statement of his receipts and payments, in order that the same may be referred to a committee for examination, with all proper vouchers, and that any balance due to the City Solicitor may be paid to him, and that any surplus which may at any time arise may be paid into the Chamber.

"That the office expenses for clerks' salaries and all other disbursements should not exceed £500 per annum."

Mr. *Druce*, Q.C., and Mr. *Bagshawe*, for the Applicant:—

This agreement is contrary to the provisions of the statutes, and opposed to the policy of the law. As the solicitor could not recover these costs against the corporation, so the corporation ought not to be allowed them against the Plaintiff.

Our contention is, that the Master is not bound to allow to the corporation even costs out of pocket; and whilst we do not ask that the disallowance shall be carried thus far, we do not waive our right to object to costs out of pocket as well.

The arrangement is, that the solicitor receives his salary on the terms that he does the whole of the business of the corporation, that he devotes his time to their affairs exclusively, and whatever

may be the amount of surplus, it is paid into the Chamber. The policy of the Act of 1860 is twofold: to prevent unqualified persons from practising as solicitors, and to maintain the control of the Court over all persons acting as solicitors within its jurisdiction. And it is plain that if the corporation should recover costs from the Plaintiff to the extent of £2000 in one year, they paying the solicitor £1250, the corporation will pocket £750 for services professed to be performed by their solicitor. Thus they may make a large yearly income, and have a substantial interest in fomenting and protracting litigation. A large brewer, engaged considerably in litigation, may, by this means, make great gains; or a patent may be profitably worked by an agreement of this kind.

A partnership between a solicitor and an unqualified person is illegal: *Tench* v. *Roberts* (1); although an arrangement whereby the widow of a deceased attorney is to receive a share of the profits is not contrary to the policy of the Act: *Candler* v. *Candler* (2).

In *Hopkinson* v. *Smith* (3) an attorney failed in an attempt to recover charges for business conducted by his clerks, acting without his instructions or superintendence. *In re Jackson and Wood* (4) was a case where an attorney employed a certificated conveyancer to practise for him, and for so doing was struck off the rolls, the offence being greater where the person infringing the statute is a professional man. *In re Palmer* (5), and other cases cited in *Re Hodgson and Ross* (6), are examples of instances where attorneys have allowed unqualified persons to use their names for professional profit, and where the proceeding was held to be a contravention of the statute of 22 Geo. 2, c. 46, s. 11.

In equity there is the case of *Gordon* v. *Dalzell* (7), which really governs the present. There a Mr. *Gordon* employed *Fraser*, a writer to the signet, as his law agent in *Scotland*, and upon his recommendation also employed *Poole* as his solicitor in *England*. There was a private arrangement between *Fraser* and *Poole*, that the latter should allow the former half the profits of the business

(1) 6 Madd. 145 (n).
(2) Ibid. 141.
(3) 1 Bing. 13.
(4) 1 B. & C. 270.
(5) 2 A. & E. 686.
(6) 3 Ibid. 224, 226
(7) 15 Beav. 351.

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transacted for *Gordon*. A petition by *Gordon*, claiming the benefit of the agreement between *Fraser* and *Poole*, was dismissed, on the ground that it was an illegal agreement; at least, that was the opinion of the Master of the Rolls, though not absolutely necessary for the decision of the case. *Scott* v. *Miller* (1) was in this branch of the Court; and to all the evils there pointed out the present agreement is obnoxious.

In *Prebble* v. *Boghurst* (2) costs, other than disbursements incurred in Chancery proceedings, were disallowed on its being discovered that the attorney was not a solicitor. In *Coates* v. *Hawkyard* (3) costs were disallowed to an agent who was not a solicitor; and a similar decision was arrived at in *Sumner* v. *Ridgway* (4).

It is the duty of a solicitor to check useless litigation, and no one but a qualified person, in whom the Court has confidence, has the right to carry on litigation, and receive the profit arising therefrom. Where the profit is taken by the solicitor, who is under the check of education and responsibility, the client has no interest in carrying on litigation unduly; but under an agreement of this kind, a client may insist upon his solicitor going on with a suit which the solicitor otherwise would have compromised, because the profit of the litigation goes, not to the solicitor, but to the client, who is an unqualified and irresponsible person.

Hockley v. *Bantock* (5) is an authority to shew that the policy of the law in giving costs is to indemnify the client; in other words, the party paying the costs is required to pay only such costs as the client is legally bound to pay. Hence, if the client has entered into such an agreement as shews that he needs no indemnity, if, as in this case, he is relieved from paying any solicitor's charges beyond the fixed salary, the right to costs, of course, falls to the ground.

It is the necessary result of this agreement that Mr. *Nelson* is a trustee of every farthing by way of costs that comes to his hands.

In this instance the corporation are entrusted by the Legislature with carrying out the *Holborn Valley Improvement*. This may

(1) Joh. 220, 5 Jur. N.S. 858. (3) 1 Russ. & My. 746.
(2) 1 Russ. & My. 744. (4) Ibid. 748.
(5) 2 My. & K. 437.

lead to a great deal of litigation: costs to a large amount may be recovered from the public; and the proposition is, that a mere depositary in an undertaking of that sort may carry on, for his own profit, the whole of the business, delegating it to a person who, though qualified, is in effect nothing more than a managing clerk.

[In conclusion, His Honour's attention was drawn to the 47th section of the Act of 1843 (1); but it was contended that this section merely exempts the City Solicitor from the penal consequences of the Act, and does not vary the general provisions or policy of the statute.]

Mr. *G. M. Giffard*, Q.C., and Mr. *Swanston*, for the City Solicitor, were not heard.

SIR W. PAGE WOOD, V.C.:—

The whole of this case appears to me to be governed by the first provision of the agreement, which is, that the City Solicitor is not to carry on business for anybody except the corporation. If the corporation were to make so strange an arrangement as to allow the City Solicitor to take advantage of his position, and to obtain other clients through the medium of holding their office, they putting into their pocket all profits coming to him from other clients, that would be distinctly within the Act; but it appears to me it would be a strange perversion of language (and Mr. *Druce's* ingenuity has not shaken my opinion) to treat the 32nd section of the 6 & 7 Vict. c. 73, as striking at such an agreement as this. [His Honour read the section.]

The agreement before me is virtually this:—A client with much work to be done arranges with a solicitor that he shall be the solicitor's only client; he undertaking to employ the solicitor in all his

(1) The 6 & 7 Vict. c. 73, s. 47, is as follows:—"Provided always, and be it enacted, that this Act, or anything herein contained, shall not extend, or be construed to extend, to the examination, swearing, admission, or enrolment, or any rights or privileges of any persons appointed to be Solicitors of the Treasury, Customs, Excise, Post Office, Stamp Duties, or any other branch of Her Majesty's Revenue, or to the Solicitor of the City of *London*, or to the Assistant of the Council for the affairs of the Admiralty or Navy, or to the Solicitor to the Board of Ordnance."

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legal business, and, with regard to that business, he undertakes to pay the solicitor a fixed yearly salary as a compensation for his trouble and services; the solicitor rendering an account at the end of the year of all his payments and receipts.

To describe an agreement of that kind as an engagement to carry on the business of a client for the profit of the client, would be, I think, a perversion of language. The agreement is simply this: that the solicitor, instead of charging his client with all those sums which he would be entitled to put down to his debit, charges the client with a fixed sum per annum, and agrees that he shall be remunerated in that way. When the client is ordered to be paid costs, the bill is to be taxed in the ordinary way, and the certified amount is to go in relief of the salary engaged to be paid, and the surplus, if any, is to be carried over. That is called an engagement for the profit of the client, and the strange way it is put is this:—that a body like the Corporation of *London*, having occasion, probably, to defend many suits, and also, probably, to institute many suits, are supposed to calculate on the profit which is to be made from carrying on all this litigation. But the prospect of making a profit in this way at all must involve the assumption of their being always right in their suits, or more often right than wrong: that they never, or seldom, institute suits but what are just, and never, or seldom, defend any suit unjustly. Observe what has happened in this very case. Mr. *Galloway* takes proceedings against the Corporation of *London*, which this Court has considered to be, I will not say improper, but wrong in point of law. That is described as a carrying on by Mr. *Nelson* of business for the profit of the corporation, because he defends a suit in which the corporation are made Defendants. As far as I remember, the corporation did not seem to embark in this litigation very willingly. Then it is imagined that a patentee may carry on a large number of suits for the purpose of making a profit. In such a case it must be assumed that the majority of his suits are just, because it is only out of costs ordered to be paid in such suits that he can derive the imagined benefit.

As to this agreement being contrary to the spirit and policy of the Act, it seems to me to be entirely the other way: because, whereas the only profit that can be derived is when the client is

in the right, the policy of the Act is directed against persons instituting unjust suits, or defending suits unjustly. If the solicitor be improperly disposed, I am not sure that there is not greater chance of his instituting and defending suits on behalf of his client when he has not entered into an agreement of this kind, than when he is to be paid by salary. It appears to me, both on principle and authority, that the Act of Parliament can have nothing to do with it.

The argument which struck me most was that with regard to the indemnity; but I cannot apprehend that the Court can investigate agreements of this nature with respect to such a question. Mr. *Bagshawe* cited a case which tended to support his view, with reference to the principle of indemnity, where a person is ordered to pay costs; and, for aught I know, if an agreement has been entered into by a client with a solicitor that he shall pay no costs, it may be a question whether or not the opposite party can avail himself of that agreement, and say to the client, you do not require indemnity. But it cannot be so in a case of this kind, where it is impossible for the Court, without directing an account between the corporation and the solicitor, to know whether these costs will or not exceed the salary they pay. There are no means of investigating whether the corporation will or will not be indemnified without such an account being directed, and an application to the Court to direct such an account, would be wholly groundless.

The application must be dismissed with costs.

Solicitors for the Applicant: Messrs. *Van Sandau, Cumming, & Sons.*

Solicitor for the Corporation: Mr. *T. J. Nelson.*

V.-C. M.
1867
Jan. 29.

SURTEES *v.* HOPKINSON.

Construction of Will—Referential Bequest—Intention of Testator.

A testator gave his real and personal estate to trustees as to one-fourth to *A.* for life, and, after her decease, in trust for her children, and, in default of children, in trust for *B.*, *C.*, and *D.*, and their issue, in the same manner as thereinafter directed respecting their original shares; as to one other fourth to *B.* for life, and, after his decease, in trust for his children, and, in default of children, in trust for *A.*, *C.*, and *D.*, and their issue, in the same manner as directed respecting their original shares; as to one other fourth part upon trust for *C.* and her children by reference to the share of *A.* using the same referential expressions as are next given concerning the remaining share; and the fourth share he bequeathed upon trust for the benefit of *D.* and his children upon the trusts, and subject to the powers and authorities, and with the like remainders over in default of issue, and similar and in all respects corresponding with the trusts, powers, and authorities expressed and declared concerning the one-fourth share bequeathed in trust for *B.* and his children as effectually as if the same trusts were there repeated. *D.* died unmarried:—

Held, that the fourth share went over, upon the death of *D.* without issue, to the other three legatees, *A.*, *B.*, and *C.*

THE testator, *Walker Ferrand*, by his will, dated the 4th of December, 1834, devised all his real and personal estate to his trustees, in trust to sell and stand possessed of the proceeds, in trust for his wife for life, with remainder to his own children, and in the event, which happened, of his dying without children, he directed the trustees, after the death of his wife and failure of his children, to hold the property upon trust to pay the annual income arising therefrom, as to one equal fourth part or share thereof, to his niece, *Sarah Martin*, during her life, and after her decease for her children; "and in case the said *Sarah Martin* shall have no child who shall live to acquire a vested interest under the trust aforesaid, then I direct that my said trustees shall stand possessed of the said one-fourth share of the said trust moneys and premises, in trust for my nephew, *William Edward Surtees*, and my two wards, *William Busfield* (who afterwards assumed the name of *Ferrand*), and *Sarah Harriet Busfield*, in equal shares, and to be paid and payable to them and their issue, respectively, in the same manner as I have hereinafter directed respecting their

original shares of the same trust moneys and premises." The testator then gave one other fourth part to the Petitioner, *William Edward Surtees*, for life, in the same manner, with remainder to his children, and in the event of his dying without children, his share was given over "in trust for *Sarah Martin*, *William Busfield*, and *Sarah Harriet Busfield*, and their issue, in equal shares, and to be paid and payable to them and their issue, respectively, in the same manner as I have by this my will directed respecting their original shares of the same trust moneys and premises;" and as to one other fourth part or share in trust for the said "*Sarah Harriet Busfield* and her children, upon and for the trusts and purposes, and with and subject to the powers and authorities, and with the like remainder over in default of issue, similar to, and in all respects corresponding with, the trusts, purposes, powers, and authorities expressed and declared concerning the one-fourth share hereby bequeathed in trust for the said *Sarah Martin* and her children, as effectually as if the same trusts were here repeated; and as to the remaining fourth part or share of the said trust moneys, upon trust for the benefit of the said *William Busfield*, my ward, and his children, upon and for the trusts and purposes, and with and subject to the powers and authorities, and with the like remainder over, in default of issue, and similar to, and in all respects corresponding with, the trusts, purposes, powers, and authorities expressed and declared concerning the one-fourth part hereby bequeathed in trust for the said *William Edward Surtees* and his children, as effectually as if the same trusts were here repeated, and upon and for no other trust, intent, or purpose whatsoever."

The testator died in 1835, and his widow died some time afterwards. This suit was instituted for the administration of the estate. *William Ferrand*, one of the four legatees named in the will, died on the 1st of September, 1865, without having been married. A Petition was now presented by *William Surtees*, praying a declaration that the one-fourth of the income of the real and personal estate to which *William Ferrand* was entitled during his life, became on his death without issue, divisible into thirds, and that the Petitioner was entitled to one equal third part thereof, for his life.

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Mr. *Shapter*, Q.C., and Mr. *Wickens*, for the Petitioner:—

In this case, there can be no doubt whatever as to the intention of the testator. It is clear that he meant the fourth share of any one of the legatees who should die without issue to go over to the other three surviving legatees. He begins by setting out the limitations as to one-fourth, which was to go to *Sarah Martin* and her children, with remainder, after her death without issue, to the three other legatees. Then he gives another fourth to *William Edward Surtees* and his children, with remainder, after his death without issue, to the other three legatees, and having fully set out the limitations in favour of the first two legatees, one a female and the other a male, he gives the third share to *Sarah Harriet Busfield*, but instead of repeating the words he had used when giving a fourth to *Sarah Martin*, he refers back to those limitations, and directs that *Sarah Harriet Busfield's* share shall be held upon the powers and authorities, and with the like remainder over, and similar to, and corresponding with, the limitations in favour of *Sarah Martin*. The fourth share being given to a male legatee, he refers back to the share given to *William Surtees*, and uses the same expressions in reference to that share as he had previously done with regard to *Sarah Harriet Busfield*, when referring back to *Sarah Martin's* fourth share. The words are not upon the "same" trusts, but with the "like" remainder over, and "similar to," and in all respects "corresponding with." These words are sufficient to create cross-remainders between the legatees: *Hunter* v. *Judd* (1); *Doughty* v. *Saltwell* (2); *Bedborough* v. *Bedborough* (3).

But if the literal construction of the words themselves is not sufficient, the Court will give effect to the evident intention of the testator, notwithstanding the actual form of words.

In *Key* v. *Key* (4), the Court departed from the literal construction of the words on the ground that it would have been repugnant to the evident intention of the testator.

Hindle v. *Taylor* (5), and *Clarke* v. *Norris* (6), shew that the Court will give effect to the evident intention of a testator,

(1) 4 Sim. 455.
(2) 15 Ibid. 640.
(3) 34 Beav. 284.
(4) 4 D. M. & G. 73.
(5) 5 Ibid. 577.
(6) 3 Ves. 362.

notwithstanding it may be contrary to the actual words used. *Hart* v. *Tulk* (1).

Mr. *Currey*, for Mrs. *Martin*:—

The intention is clear—to make cross-remainders between the legatees.

Mr. *Charles Browne*, for *Sarah Harriet Hailstone* and her husband and children.

Mr. *Chute*, for Mrs. *Monkton* and her husband, and for a trustee of one of the next of kin.

Mr. *Rendall*, for the first Defendant.

Mr. *Baily*, Q.C., and Mr. *Vaughan Hawkins*, for *Charles Turner*, the legal personal representative of one of the next of kin, and also for Mr. and Mrs. *Amphlett*:—

You can only ascertain the intention of a testator by the words he has used. It is quite true that you must endeavour to construe a will according to the intention of the testator, but the acknowledged rules of construction must be adhered to, otherwise there would be no certainty as to the meaning of the words. The bequest in this will is distinct: the fourth share is given by reference to the manner in which the second share is given, and when you look to that bequest you find that upon the death of the legatee without children the share is given to three persons, including the fourth legatee over again. In the case of *Clarke* v. *Norris* (2), the Court must have assumed that there was a mistake in the insertion of a wrong christian name, and so in the other cases cited there was so palpable an inconsistency in the language, that the Court corrected the mistake. In *Gundry* v. *Pinniger* (3), Lord *Cranworth* refused to depart from the literal meaning of the words, observing that when you do so you are launched into a sea of difficulties.

Mr. *Osborne*, Q.C., and Mr. *Cadman Jones*, for *William Busfield Ferrand*, and three of the Defendants.

(1) 2 D. M. & G. 300. (2) 3 Ves. 362. (3) 1 D. M. & G. 502.

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Mr. *E. F. Smith*, Q.C., Mr. *C. Hall*, and Mr. *Phillpotts*, for other Defendants, contended that there was an intestacy as to *W. Busfield's* share, and cited *Lumley* v. *Robbins* (1), which was a gift by reference to a legacy subsequently bequeathed; *Bird* v. *Luckie* (2), where the literal construction of the will was adhered to, notwithstanding it was evidently contrary to the testator's intention; *Bullock* v. *Downes* (3); *Lightfoot* v. *Burstall* (4); and *Slingsby* v. *Grainger* (5), in which the House of Lords adhered to the strict grammatical meaning of the words.

SIR R. MALINS, V.C.:—

The objects of the testator's bounty were, his niece, *Sarah Martin*, his nephew, *William Edward Surtees*, his great niece, *Sarah Harriet Busfield*, now Mrs. *Hailstone*, and his great nephew, *William Busfield*, afterwards *Ferrand*. The scheme of the will is plainly to give to each of the four persons one-fourth of his property, with remainder to his or her children, and in default of the issue of each, to carry the share of the one whose issue should fail, to the remaining three for life, with remainder to their children in the same manner as the original share of each was given.

William Ferrand having died without issue in September, 1865, the question is, in what way his one-fourth of the testator's estate is disposed of. It is contended by the Petitioner, *William Edward Surtees*, and by Mrs. *Martin*, and Mrs. *Hailstone*, that they are entitled to that share for their lives under the gift over; and on the part of the Respondents, who are the next of kin, or representatives of the next of kin, of the testator, it is contended that I am bound to read the gift over precisely the same as if the words of the gift to the Petitioner had been repeated, and consequently as a gift of one-third of one-fourth upon the death of *William Ferrand* without issue to himself for life, with remainder to his children. And in support of that argument, it was urged that I am bound to adhere to what the testator has said, although I may feel certain that it is not what he intended, for which numerous authorities

(1) 10 Hare, 621, 17 Jur 410
(2) 8 Ibid. 301.
(3) 9 H. L. C. 1, 21.
(4) 1 H. & M. 546, 10 Jur NS 308
(5) 7 H. L. C. 273, 284.

were cited. But, on the other hand, it is contended for the Petitioner and those who are in the same interest with him, that there are many cases in which the precise language of the testator is disregarded when it is inconsistent with his plain intention, and when an adherence to it would manifestly defeat that intention.

Upon this principle, in *Hart* v. *Tulk* (1), the words, "The said fourth schedule," were read as, "the said fifth schedule," because, upon consideration of the whole will, it was plain that the testator had made a mistake in speaking of the fourth, while he meant the fifth, schedule, and that a strict adherence to his words would have defeated the whole scheme of his will as to the disposition of his property amongst his children; and, in arriving at that conclusion, the Lords Justices *Knight Bruce*, and Lord *Cranworth*, overruled Sir *James Parker*, a Judge of most deservedly high authority.

In *Langston* v. *Langston* (2), a case not cited at the bar, where the testator devised his very large estates to his son *James Arthur Langston* for life, with remainder to his second, third, fourth, fifth, and every other son and sons in tail male, the House of Lords inserted a limitation to the first son, because, upon consideration of the frame of the whole will, the House was satisfied that the limitation to the first son was accidentally omitted, and that his exclusion would have defeated the whole scheme of the testator's will. [His Honour read the observations of Lord *Lyndhurst* (3) in giving judgment in that case.]

In *Key* v. *Key* (4) the devise was in these terms: The testator there gave his property to his nephew, *Samuel Key*, for life, and then charged it with certain annuities. Then he introduces the gift to the son of *Samuel Key*, in these words: "But in case the aforesaid annuitants, or any of them, shall survive the said *Samuel Key*, I then give and bequeath the aforesaid estate at *Ashley Fulville* unto the eldest surviving son of the said *Samuel Key*, charged with the aforesaid" annuities, but in default of issue male "I give and bequeath the above demised premises unto his brother *Thomas Key*, charged in like manner with the aforesaid annuities, and unto his eldest surviving son on the same conditions; but in default of issue

(1) 2 D. M. & G. 300.
(2) 2 Cl. & F. 194.
(3) 2 Cl. & F. 243.
(4) 4 D. M. & G. 73.

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male my will is that the aforesaid demised premises do descend unto my heirs at law." Here, according to the strict words of the will, the devise to the son was made to depend on his surviving some of the annuitants, but as the literal adherence to the language would have defeated the manifest intention of the testator, it was disregarded, and the will was construed to mean merely that the son was to take, subject to the annuitants, in case any of them continued to exist. [His Honour read the judgment of Lord Justice *Knight Bruce* in that case.]

Upon these authorities I should have been justified in departing from the strict language of this will, in order to effectuate the manifest intention, if the language had been inconsistent with that intention. But is the language inconsistent with that intention? Now, with regard to this particular share, the object being, as I have said, manifestly to carry each share as it is liberated by the death of the tenant for life over to the three remaining objects of his bounty; the testator, having given two model forms, one with regard to a male tenant for life, and another with regard to a female tenant for life, does not think it necessary to repeat all the limitations, but does it by reference; and with regard to the share which was given to *William Ferrand*, liberates it on his dying without issue. The words are, "upon and for" the trusts and purposes, and "with and subject to the powers and authorities," and with the like remainder over in default of issue, and similar to, and "in all respects corresponding with, the trusts, purposes, powers, and authorities expressed and declared concerning the one-fourth part hereby bequeathed in trust for the said *William Edward Surtees*." Now, the words are not that it is to go to the same limitations, because it has been urged upon me that I am bound to give the same limitations that are given in the event of *William Edward Surtees* dying without issue, the effect of which would be that, in the case of the man dying without issue, which event is one provided for by the testator, it would give to the same tenant for life one-third of one-fourth again, with remainder to his children. It is perfectly clear that that could not have been the testator's intention. His object was to carry it over to those capable of taking, namely, the other three objects of his bounty, with remainder to their children in the same manner as

he had given their original shares. But then the words are not "to go over with the same limitations," but "with like remainder." The remainder, with regard to *William Edward Surtees*, shews he carries it over to the three other objects of his bounty. Therefore, *William Ferrand* having died without issue, the result is, that his object is to carry it away from *William Ferrand*, whose death has occurred, to those who are alive, and may have children to succeed them. Again, the words are, "with the like remainder over in default of issue, and similar to, and in all respects corresponding with." What is the meaning of "corresponding with?" Why, effectuating the like object corresponding with what he had said as to *William Edward Surtees*' share, that if he died without issue his share was to go over to the other three objects of his bounty, who were to take the accruing share, as they took the original shares. The words are not "the identical limitations;" they are, "the like limitations;" and "the corresponding limitations."

I am, therefore, satisfied that that is the intention of the testator, and I am also satisfied, upon principle and authority, that I am at liberty, and not only at liberty, but bound, in this case, as in all other cases, to find a rational construction for the language of the testator, if possible; and, upon that rational construction of the language used by the testator, I am satisfied that his intention was to carry the property over to the three objects of his bounty. I am bound to put that construction, not only on principle, but authority. I feel confident that is the construction of the will; and there will be a declaration accordingly.

MINUTES:—Declare that the income of one-fourth of the testator's real and residuary personal estate to which the late *William Ferrand* was entitled for life, went over on his death, without having had issue, in equal third shares to the Petitioner, the Plaintiff *William Edward Surtees*, and *Sarah Harriet Hailstone*, for their respective lives. Consequential relief.

Solicitors for the Plaintiff: Messrs. *Field, Roscoe, & Co.*

Solicitors for the Defendants: Messrs. *Hawkins, Bloxam, & Co.*; Messrs. *Lake & Walker.*

M. R.

1867

June 3, 26.

BROOK *v.* BADLEY.

Statute of Mortmain (9 *Geo.* 2, *c.* 36, *s.* 3)—*Gift for Charitable Uses—Legacy charged on Land—Arrears of Rent.*

A legacy charged on land is an interest in land within the *Statute of Mortmain*, s. 3, and cannot while it remains unpaid be bequeathed for charitable uses by the legatee.

A testatrix demised the minerals under certain lands in consideration of a surface rent, and of a sum of £5039 1*s.* 3*d.*, to be paid by half-yearly instalments, at the rate of £750 per acre for such part of the minerals as should be gotten by the lessees, until the whole sum was completely paid, with powers of distress and re-entry in default of payment. At the death of the testatrix one instalment was due and unpaid:—

Held, that it was in the nature of rent, and passed under a residuary bequest in favour of charities.

THIS was the further consideration of a suit for the administration of the estate of *Caroline Elizabeth Pargeter*, who died on the 26th of April, 1864, having, by her will, dated the 8th of August, 1862, given all her personal property "applicable for the purposes of mortmain," to trustees upon trust for charitable purposes. The questions now raised were, whether certain parts of the testatrix's property were, or were not, pure personalty, and as such applicable for the charitable trusts. The present report relates only to two of the items in question, viz., a legacy of £3000 under the will of Dr. *Withering*, purchased by the testatrix of the legatees: and a sum of £250, due to her at the time of her death under an indenture of lease of the 15th of June, 1859.

Dr. *Withering's* will was dated the 21st of August, 1830; by it he gave all his real estate to trustees upon trusts for the benefit of his wife during her life: and he bequeathed his personalty to the same trustees upon the same trusts. He then declared that it should be lawful for the trustees, at and after the decease of his wife, or (with the exception of a certain specified mansion-house), at any time during her life, if at any time it should seem to them expedient, to sell all or any part of his said premises or otherwise available property: and he directed them to stand possessed of the proceeds upon trust thereout to pay his debts, and funeral and

testamentary expenses, and all such pecuniary legacies as he might direct to be paid thereout or therefrom, and to place the remainder, with his other moneys and personal estate, out at interest on such securities as therein mentioned: and then after reciting that, under the will of Mrs. *Lydia Richards* he derived property which he estimated at £6000, he directed that out of the money to be received from the sale of his aforesaid available property, his trustees should set apart the sum of £6000; and, after the decease of his wife, he bequeathed £3000, part thereof, to certain persons therein mentioned, and £3000, the residue thereof, to a person from whom, as mentioned above, the testatrix in the cause purch.. the same. The testator proceeded to bequeath a series of legacies, to be paid out of his personal estate.

Dr. *Withering* died in June, 1832; his widow was still living; the legacy of £3000 had never been raised or paid; and there was no evidence that any part of the realty had been sold.

Mr. *Southgate*, Q.C., and Mr. *Peck*, for the Plaintiffs, the executors of the will.

Mr. *Jessel*, Q.C., and Mr. *F. C. J. Millar*, for the Defendants *Badley*, and Mr. *Selwyn*, Q.C., and Mr. *Sargant*, for other parties beneficially interested:—

By the will of Dr. *Withering* the legacy in question is primarily charged on real estate; therefore it is clearly an interest in land within the *Statute of Mortmain*. But, even if the legacy were only secondarily chargeable on the realty of the testator, that would make no difference. Suppose a mortgage included both realty and pure personalty, and a testator bequeathed the mortgage debt to a charity, would that be valid, so far as the debt was charged on the personalty? [They referred to *Harrison* v. *Harrison* (1).]

Mr. *Baggallay*, Q.C., and Mr. *T. S. Osler*, for the charities:—

We admit that if this had been a legacy charged on land, and bequeathed for charitable purposes, it must have failed; or, if it had been payable out of a mixed fund, it must have abated *pro*

(1) 1 Russ. & My. 71.

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ratâ. But there is a difference where the Court is not administering the will of the original testator; the character of the gift alters after it has passed through one or more hands: *Shadbolt* v. *Thornton* (1); *Marsh* v. *Attorney-General* (2); *Myers* v. *Perigal* (3). The case of *Attorney-General* v. *Harley* (4) is difficult to reconcile with these authorities; but so far as it is inconsistent with them it must be deemed to be overruled. In *Aspinall* v. *Bourne* (5), and *Lucas* v. *Jones* (6), the cases of *Marsh* v. *Attorney-General*, and *Shadbolt* v. *Thornton*, have, however, been doubted. [*Thornber* v. *Wilson* (7), and *Church Building Society* v. *Coles* (8), were also referred to.]

At all events an inquiry ought to be made as to the values of the real and personal estate of Dr. *Withering*, with a view to an apportionment of the legacy in like manner as if it had been given out of a mixed fund.

By the indenture of the 15th of June, 1859, mentioned above, the testatrix, in consideration of a surface rent thereby reserved, and of a sum of £5039 1*s*. 3*d*., to be paid by instalments, demised certain lands of which she was seised in fee, and the mines and minerals thereunder, to the persons therein mentioned, for a term of ten years from the 25th of March, 1859; and the lessees thereby covenanted to pay the sum of £5039 1*s*. 3*d*. by the following instalments: £500 upon the execution of the indenture; £500 on the 29th of September, 1859; £500 on the 25th of March, 1860; and thereafter at the rate of £750 per acre, for and in respect of such part of the mines as should be gotten by the lessees after the 25th of March, 1860, until the remainder of the sum of £5039 1*s*. 3*d*. should be fully paid and satisfied, such last-mentioned sum of or at the rate of £750 per acre, to be paid and discharged by equal half-yearly payments, on the 25th of March and the 29th of September in each year; and in case default should be made in payment of the several sums and the surface rent thereby

(1) 17 Sim. 49.
(2) 2 J. & H. 61, 7 Jur. N. S. 184.
(3) 2 D. M. & G. 599, 17 Jur. 145.
(4) 5 Madd. 321.
(5) 29 Beav. 462.
(6) Law Rep. 4 Eq. 73.
(7) 4 Drew. 350, 4 Jur. N. S. 126.
(8) 5 D. M. & G. 324, 1 Jur. N. S.

reserved and made payable, for the space of forty days after the several days and times thereinbefore appointed for payment thereof, the testatrix was to be at liberty to enter on the demised premises, and stop the workings, and distrain the minerals then gotten, and any live or dead stock thereon, and if no sufficient distress could be found, to re-enter thereon: and from the time of such re-entry the indenture was to be void, and the term thereby created to cease.

At the death of the testatrix, the whole of the sum of £5039 1*s.* 3*d.* had been paid, with the exception of £250, which had become due on the 25th of March, 1864.

Mr. *Jessel*, Q.C., contended, that the sum of £250 was in the nature of unpaid purchase-money for which the testatrix had a lien on the demised land, and that she could not bequeath it to a charity: *Harrison* v. *Harrison* (1).

Mr. *Baggallay*, Q.C., *contrà*, argued that the sum of £250 was in the nature of rent, for which the testatrix had the ordinary powers of distress and re-entry.

June 26. LORD ROMILLY, M.R., after stating Dr. *Withering's* will, and the facts relating to the legacy of £3000, and remarking that it was clearly charged on his real estate, continued:—

Mr. *Baggallay* very properly admitted that if the legacy of £3000 had, by Dr. *Withering's* will, been given to a charity, he could not have maintained that it was valid; but he contends that when this legacy forms part of the property of a legatee, it becomes pure personalty in the hands of that legatee, and may be bequeathed by that legatee to a charity, although, in fact, the legacy has never been raised, and is still a charge upon the land.

This question first came before the Court in *Attorney-General* v. *Harley* (2). [His Lordship read the marginal note and the judgment]. This is directly in point, and if not overruled must govern the case before me. It came again, in a different way, before the Court in *Shadbolt* v. *Thornton* (3). In that case the Vice-Chan-

(1) 1 Russ. & My. 71. (2) 5 Madd. 321 (3) 17 Sim. 49.

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cellor considered that the conversion into pure personalty must be considered to have actually taken place at the time when the duty to do so arose; and if that be all that is decided by that case, it would not assist the construction in favour of the charities here, as the obligation or duty to sell the land and pay the legacy does not arise until the death of the testator's widow, which time has not arrived. The next case is *Marsh* v. *Attorney-General* (1). This goes one step further, for the period of sale had not there arrived; and it is, I think, impossible to reconcile *Marsh* v. *Attorney-General* with *Attorney-General* v. *Harley* (2).

Middleton v. *Spicer* (3) has, I think, no application to the present case; so also I think that *Myers* v. *Perigal* (4) does not affect the present question. All that was decided in that case was with reference to a share in a partnership, where part of the partnership property consisted in land or interests in land.

In *Jeffries* v. *Alexander* (5), the House of Lords, reversing the decision of the Lords Justices, held that a covenant by a man with trustees to pay a sum of money to be applied by them in charity, where his pure personalty was insufficient to discharge the debt, was invalid as against the provisions of the *Statute of Mortmain*.

In this uncertain state of the authorities, I am of opinion that I must refer to the *Statute of Mortmain* itself, and consider the matter as if it were *res integra*, and not covered by any decision. The words of the 3rd section of the statute, 9 Geo. 2, c. 36, are these: "All gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time from and after the said 24th day of June, 1736, be made in any other manner or

(1) 2 J. & H. 61; 7 Jur. N.S. 184.
(2) 5 Madd. 321.
(3) 1 Bro. C. C. 201.
(4) 2 D. M. & G. 599; 17 Jur. 14
(5) 8 H. L. C. 594; 7 Jur. N.S. 221.

form than by this Act is directed and appointed, shall be absolutely and to all intents and purposes null and void."

I cannot get over these words. I think it is impossible to say that this legacy of £3000, charged on Dr. *Withering's* lands, is not an interest in land, or that, as Miss *Pargeter* could, had she been living, on the death of Mrs. *Withering*, have required this amount to be raised by sale of part of the land, it is not an interest in land within the words of the statute. It is, I think, an injurious practice (which Courts of justice occasionally indulge in), viz., that of putting a forced construction on the words of a statute, which is not the plain and obvious meaning of them, in order to avoid the effect of an enactment which the Court of justice at the time considers prejudicial to society. Not that I consider this Act prejudicial to society; it has, in my opinion, frequently prevented the perpetration of gross injustice to near relations of the testator; nor am I able to discover the merit which some persons seem to attribute to a dying man who gives to a charity what he is no longer able to enjoy himself. I must therefore hold, that this legacy did not pass under the bequests in Miss *Pargeter's* will to charities.

I do not think the other question is open to much doubt. I am of opinion that the sum of £250 was pure personalty; that it was rent in the proper sense of that term, and not unpaid purchase-money. It is true it was rent for leave to work a mine, in doing which the soil is taken away, and in one sense it is purchase-money for the minerals gotten; but I think that, in the proper meaning of the words, it is more analogous to rent, and that a rent of this description, or a royalty on minerals due at the death of a testator, is pure personalty, and not subject to the provisions of the statute; and I decide accordingly.

Solicitors: Mr. *S. W. Johnson;* Messrs. *Ashurst, Morris, & Co.;* Messrs. *Clarke, Woodcock, & Ryland,* agents for Mr. *Chesshire, Birmingham;* Messrs. *Robinson & Preston.*

M. R. 1867 May 30.

SLIPPER *v.* TOTTENHAM AND HAMPSTEAD JUNCTION RAILWAY COMPANY.

Railway Company—Specific Performance—Leaseholds—Lessor's License—Apportionment of Rent—Lands Clauses Act, s. 119.

Where a railway company serves a notice, under the *Lands Clauses Act*, on a lessee to take land held under a lease containing a proviso against assignment without the license of the lessor, the necessity for such license is taken away by the operation of the Act.

Where a portion of the land comprised in a lease is taken by a railway company, the lessee is not bound, under sect. 119 of the *Lands Clauses Act*, to procure the lessor's consent to the agreement with the company for the apportionment of the rent.

Specific performance decreed against a company by whom leasehold land had been so taken under a notice, where the lessor's license to the assignment and consent to the apportionment of rent had not been obtained.

THIS was a suit for the specific performance of a contract entered into by the Defendants, the railway company, for the purchase of certain leasehold land held by the Plaintiff, together with other land, as assignee of a lease whereby the lessor, *J. A. Craven*, demised the property comprised therein for a term of years, with a proviso that the land should not be assigned without the lessor's license.

In July, 1863, the company served a notice on the Plaintiff, under the provisions of the *Lands Clauses Act*, that they required to take the land in question, and were willing to treat for its purchase, and in July, 1864, the Plaintiff sent in his claim, which was not agreed to.

In September, 1864, the Defendants paid into the bank the sum of £195, and executed a bond in that sum conditioned for payment of such purchase-money as might be determined under the Act. They then entered into possession of the land, which was, in 1865, valued by agents on behalf of the Plaintiff and on the part of the company, on the footing of an apportioned rent of £5 per acre, proposed by the Plaintiff's agent.

An abstract of the lease and assignment was served on the company, and the company's solicitor prepared the draft assignment, to

which the lessor was made a party, and sent it to the Plaintiff's solicitors. The Plaintiff declined to procure the lessor's consent.

The company objected to complete on the ground that the lessor's concurrence was necessary under the provisions in the lease; and further, that the apportionment of the rent which had been agreed upon between the Plaintiff and the company could not be settled unless the Plaintiff obtained the lessor's consent.

The Plaintiff accordingly filed his bill to enforce the specific performance of the contract.

Mr. *Selwyn*, Q.C., and Mr. *Elderton*, for the Plaintiff, contended that the defence raised by the Defendants could not be sustained; for where notice was given to take leasehold land by a company under the *Lands Clauses Act*, the lessor's license was not required. They referred to *Weatherall* v. *Gearing* (1); *Smith* v. *Capron* (2); *Wadham* v. *Marlowe* (3); *Doe* v. *Carter* (4); *Bowser* v. *Colby* (5).

Mr. *Speed*, and Mr. *Townsend*, for the company:—

In this case there was no completed agreement which can be enforced. But, assuming that there was, the lessor's consent under the proviso in the lease is necessary to the assignment, and the vendor is bound to procure it. The cases where such consent has been held to be unnecessary have arisen where the assignment took place by operation of law, whereas in this case the purchase was not made under the compulsory clauses of the Act, and stands on the same footing as if it were under an ordinary agreement. Further, the company cannot complete the purchase without the consent of the lessor to the apportionment of the rent. The 119th section of the *Lands Clauses Act* provides, that, where a portion of the lands comprised in a lease is required to be taken, the apportionment of the rent shall be determined by agreement between the lessor and the lessee on the one part, and the promoters of the undertaking on the other part, and that, if it be not so settled, the apportionment shall be settled by two justices. Here there is

(1) 12 Ves. 504.
(2) 7 Hare, 185.
(3) 8 East, 314, n.
(4) 8 T. R. 57.
(5) 1 Hare, 109.

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no evidence of a binding agreement between the lessor and the Plaintiff, and no other steps have been taken in respect of the apportionment.

LORD ROMILLY, M.R. :—

I am of opinion that as soon as the land is required for the purposes of the railway, and notice is given to take it under the Act, the license to assign is no longer required, being virtually taken away by the clause of the Act of Parliament, as is laid down in an analogous case in *Wadham* v. *Marlowe* (1). The lessor can neither refuse the license to assign, nor assent to the assignment, for he has nothing more to do with it. The way to test it is this: Suppose the whole land included in the lease were taken, and that the railway company made a separate agreement with the lessor for the reversion of the lease, and another with the lessee for the land included in the lease, and then the lessor were to say, "I do not choose to give any warrant or license to the lessee to assign," could that give him the slightest advantage? I am of opinion that it could not. I apprehend that it is virtually included in the clauses of the Act of Parliament, which compel all the persons who are entitled to the land to give it up to the company, and only leave various courses open to them by which it may be done,—one by arrangement, another by arbitration, another, settlement by a jury, but which all give exactly the same rights and powers, so that the lessor need not be required to give, and has no authority to give, any license to assign.

With respect to the apportionment, I am of opinion also that the Plaintiff could not do anything further with respect to the lessor. The 119th section of the Act provides that the apportionment may be settled in one of two ways, either by agreement, or by going before a magistrate, and so settling it. The lessee has settled it, so far as he is concerned, by agreement with the company. It is to be observed that in the section only two parties to such an agreement are contemplated, the lessor and lessee on the one side, and the company on the other. So far as the lessee is concerned he has agreed with the company, but there is no power in the Act which enables the lessee to call upon the

(1) 8 East, 314, n.

lessor to settle any arrangement between them, and the only persons who can do that are the company themselves; and if they do not choose to do that, the matter must remain unsettled. It is for them to call upon the lessor and lessee to come before the justices to bind them with respect to the amount of the apportionment of rent.

The decree will recite that the Court is of opinion that the license to assign was taken away, so far as relates to the land required by the railway company, by the operation of the statute, and that the Plaintiff was not bound to procure the consent of the lessor to the apportionment of the rent between himself and the company, and will decree specific performance of the contract, with an inquiry whether a good title can be made, no point being raised with regard to the two questions now decided.

Solicitors for the Plaintiff: Messrs. *Pilgrim & Phillips.*
Solicitor for the Defendants: Mr. *H. Toogood.*

VEAL *v.* VEAL.

Fund in Court—Payment out of small Sum—Married Woman—Affidavit of no Settlement.

In paying out of Court a fund divisible into shares of less than £10 each, to some of which married women were entitled, the Court dispensed with affidavits of no settlement.

IN this cause a fund in Court had become divisible into twenty-two shares of less than £10 each, and an order had been made for payment of the fund to the solicitor of the parties having the carriage of the proceedings, he undertaking to pay the same to the persons entitled, some of whom were married women. The registrar declined to draw up the order until an affidavit was produced to him that no settlement had been made on the marriage of any of the married women entitled to shares.

Mr. *Decimus Sturges* now applied to the Court to dispense with the production of such an affidavit, stating that he had been in-

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formed by two of the registrars (Mr. *Monro* and Mr. *Farrer*), that they believed that the same thing had been done within the experience of each of them, although neither could refer to any particular case in point; and he also stated that they considered the production of the affidavit to be a matter within the discretion of the Court.

LORD ROMILLY, M.R., dispensed with the production of the affidavit.

Solicitor: Mr. *Aston*.

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FARINGTON *v.* PARKER.

Settlement of Jewels—Married Woman—Trust, in default of Appointment by writing, for "her sole and absolute Disposal"—Gift by Manual Delivery.

Under a settlement certain jewels were assigned upon trust for such person as *G.* (a married woman) should by writing direct or appoint, and in default of such appointment, upon trust for her during her life for her separate use, and to be at her absolute disposal, and her receipt, or that of the person to whom she should direct the jewels to be delivered, to be a good discharge. *G.*, without any direction in writing, delivered the jewels as an absolute gift to *V.*, who retained them in her possession. After the death of *G.* the question arose as to the validity of the gift to *V.*:—

Held, that *G.* had power to dispose of her whole interest in the jewels without any direction in writing, and that under the gift and manual delivery *V.* was absolutely entitled to them.

THIS was a suit instituted by a trustee of a voluntary settlement, which comprised certain valuable family jewels, formerly the property of Lady *Hoghton*, asking the Court to execute its trusts, and to direct the delivery of the jewels to the person entitled to them.

By the deed, which was dated the 4th of December, 1835, and made between Lady *Hoghton*, then a widow, of the first part, her daughter *Ann*, the wife of *J. B. Glegg*, of the second part, and *William Farington*, since deceased, of the third part, after reciting that Lady *Hoghton* was desirous, in consideration of her natural love and affection to her daughter, to settle the jewels thereinafter enumerated in the schedule to her separate and exclusive use, in

manner thereinafter mentioned, she, Lady *Hoghton*, assigned to *Farington* all the jewels described in the schedule thereto, upon trust to "assign, transfer, set over, or otherwise dispose of the said jewels, to such person or persons, and in such manner, as the said *Ann Glegg*, notwithstanding her coverture, shall, by any writing signed with her own hand, direct or appoint; and, so far as any such direction or appointment shall not extend, to permit and suffer the said *Ann Glegg*, during her life, to have, hold, use, and enjoy the said jewels at her will and pleasure, for her own separate and peculiar use and benefit, and exclusively of her husband; and so that the same may be for the sole and separate use, and at the sole and absolute disposal, of her the said *Ann Glegg* as if she were sole and unmarried, and in nowise subject or liable to the debts, control, or interference of her husband; and the receipt in writing of the said *Ann Glegg*, or of the person or persons to whom she shall direct the said jewels to be delivered, to be an effectual release and discharge for the same;" and upon further trust that if *Ann Glegg* should survive her husband, to assign the jewels, or such of them as should not be appointed or disposed of by *Ann Glegg*, to her, the said *Ann Glegg*, her executors, administrators, and assigns.

The Plaintiff was the executor of *William Farington*, and the present trustee of the jewels under the deed. Lady *Hoghton* died in 1862, having appointed the Defendant, *Robert Parker*, her executor. *Ann Glegg* died in 1865, leaving her husband surviving her, who afterwards died, having by his will appointed the said *Robert Parker* his executor.

One of the claimants to the jewels was the Defendant *Parker*, who claimed them either as executor of Lady *Hoghton*, under a resulting trust to her, as being undisposed of by *Ann Glegg*, or as executor of *J. B. Glegg*, on the ground that they belonged to him in right of his wife, *Ann Glegg*.

The other claimant to the jewels was the Defendant Lady *St. Vincent*, daughter of *Ann Glegg*, who claimed them under a gift, without writing, from her mother; or, if that was not sufficient, under an instrument purporting to be her will, and executed prior to the delivery of the jewels, and which, though not sufficiently attested to admit of its being proved, was nevertheless, as she con-

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tended, sufficient to operate as a good assignment under the power in the deed.

Lady *St. Vincent*, in her answer, described the circumstances under which the jewels were delivered to her while on a visit to her mother. After stating that the jewels remained in the possession of her mother after the execution of the deed, she said that she was present at the house of her father and mother on the 18th of May, 1865, and added, "she there gave to me the jewels mentioned in the schedule to the indenture, and I then and there, in the presence of my father and sister, received the jewels from the hands of the said *Ann Glegg* as a free and absolute gift. And immediately after my so receiving the said jewels from my mother, I asked my father to lock them up for me in his strong box for safety during my stay; and he accordingly so placed and kept the jewels for me until the termination of my visit, and gave them himself into my hands on the day of my departure, and from and since that day I have had the same jewels in my own possession or power."

There were two questions which were argued at the hearing of the cause, one relating to the validity of the gift to Lady *St. Vincent*, the other to the validity of the appointment by the unattested instrument purporting to be a will; but as, in the view of the case taken by the Court, it was not necessary to decide the latter point, the argument on that question is not reported.

Mr. *C. Hall*, for the Plaintiff.

Sir *Roundell Palmer*, Q.C., and Mr. *Bowring*, for the Defendant *Parker*:—

On the construction of the deed we contend that the gift which in default of appointment in writing by *Ann Glegg*, was "for the sole and separate use, and at the sole and absolute disposal of the said *Ann Glegg*," followed by the gift over after her decease, could not have the effect of giving her any further power of appointment beyond her life. The power of appointment is in express terms as she should "by writing signed with her own hand direct or appoint." This is inconsistent with the supposition that she should have the power of absolutely disposing of the jewels in

default of such appointment in writing. The words "for her sole and absolute use and disposal" do not give her a new power of appointment beyond her life interest, but they relate to the former words "for her life," and simply confer on her, if her power of appointment by writing is unexercised, the ordinary enjoyment during her life under a gift for her separate use. The question is, whether she has exercised this power of appointment? The delivery to Lady *St. Vincent* was no exercise of the power, for it was a gift by manual delivery, which did not fulfil the condition of the power, and passed nothing beyond her life interest. Therefore, as *Ann Glegg* had no power to make an absolute disposition by virtue of the trust for her separate use, and as the unattested will was no exercise of the power, the jewels must revert to the settlor by resulting trust, and belong to *Parker* as her representative, or else he is entitled to claim them as the executor of *J. B. Glegg*, in right of his wife.

The *Attorney-General* (Sir *John Rolt*), Mr. *Baggallay*, Q.C., Mr. *Prendergast*, Q.C., and Mr. *Horsey*, for Lady *St. Vincent*:—

Under the settlement *Ann Glegg* had, first, a power of appointment over these jewels, by writing signed with her own hand, then a gift for her separate use, and, lastly, a power during her life to dispose of them absolutely in any way that she pleased. The words following the gift to her for her separate use, namely, "at the sole and absolute disposal of *Ann Glegg*," coupled with the terms of the gift over on her surviving her husband, if they should not be "disposed of" by her, shew that she was to have a power of disposition during her life. The intention was that, if she did not appoint by writing signed by her hand, she should have an absolute power of disposition. That power has been duly exercised by the gift and manual delivery of the jewels to Lady *St. Vincent*.

April 16. LORD ROMILLY, M.R., after stating the facts of the case, said—

The question is, whether Mrs. *Glegg* had the power, under the deed of December, 1835, to dispose of the jewels without any

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instrument in writing, and I think that on the true construction of the deed she had that power. The first trust is for such person as she shall appoint by any writing signed with her own hand; in default of appointment the trust is to her for life apart from her husband, with these words, "for the sole separate use, and at the sole and absolute disposal of the said *Ann Glegg*." This does not refer to the appointment before mentioned, which was to be in writing and signed by her, but she is here to have sole and absolute disposal of the jewels, as if she were sole and unmarried. That this is not confined to her life estate is shewn by what follows, for "the receipt of the person to whom *Ann Glegg* shall direct the jewels to be delivered" is to be a good and effectual discharge for the same.

How is this to be confined to her life interest? Assume that the jewels had been, in May, 1865, in the possession of the trustee, that he had been present with them in the room at the time of the gift, that Mrs. *Glegg* had directed him to deliver the jewels to Lady *St. Vincent*, and that Lady *St. Vincent* had thereupon given the trustee a receipt in writing for them, could it be contended, on the true construction of the deed, that the trustee would have committed a breach of trust in so delivering them? The words in the deed are, "the person to whom she shall direct the jewels to be delivered;" why is the Court to interpolate the words "in writing," in order to defeat the interests of the parties, or why is the Court to introduce the words "during the life of the said *Ann Glegg*," to qualify her power of disposition?

I am of opinion that the scope of the deed is to give Mrs. *Glegg* a power of appointing these jewels by any writing signed by her, that is, during her life, which might take effect either at once, or after her decease; that, subject to this power, she was to enjoy the jewels during her life free from the control of her husband, but that, beyond this, she was, during coverture, to have the full power of disposing of them as she pleased, and that all the trustee could require was a receipt from the person to whom she directed them to be delivered.

I am therefore of opinion that the gift and delivery of these jewels to Lady *St. Vincent*, conveyed the whole interest in them to her, and that they then ceased to belong to Mrs. *Glegg*.

This being my opinion, it is not necessary to go into the second question whether the document written in the handwriting of Mrs. *Glegg*, purporting to be her will, by which she gave the jewels to Lady *St. Vincent*, is a due compliance with the terms of the power. It may, however, be proper to observe, that there is a considerable distinction between a power to appoint "by any writing signed with her own hand," and a power to appoint "by will or writing signed with her own hand;" in the latter case it would be bad, because she proposed to execute the power by will, and this was no will; but if the power be to be performed by a writing only signed by her, it might reasonably be contended that an instrument in writing signed by her, which this is, satisfied the conditions of the power, though she did not intend that it should have the force of a will.

It is not however necessary to pursue this subject, for I am of opinion that, on the construction of the instrument itself, Mrs. *Glegg* had power to dispose of her whole interest in the jewels by giving directions to deliver them to any particular person, and, following that direction, by delivering them, though such direction was verbal merely, and was not given in writing. I will make a declaration to this effect. This is in the nature of an interpleader suit, though not exactly one, and the Plaintiff must have his costs, which must be paid by the Defendants in equal moieties.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Myres & Houghton, Preston;* Mr. *C. J. Graham.*

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May 2, 3.

LOCH *v.* BAGLEY.

Will—Gift to Daughters "to be settled upon themselves strictly"—Form of Settlement.

Where a testator directed that his daughters' shares under his will should be "settled upon themselves strictly":—

Held, that the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her for life for her separate use, without power of anticipation; and if she died first, then her share should go as she should by will appoint, and in default of appointment to her next of kin, exclusively of her husband; and if she survived, then to her absolutely.

C. H. CLAY, the testator in the cause, by his will, made in 1824, gave all his personal estate to his wife for her life, with remainder to his children equally, with the addition of the following words:—"the girls' shares to be settled on themselves strictly."

The testator died in 1839, and his widow died in 1865. Three of the daughters were married and had children.

The suit was instituted to administer the testator's estate, and one of the questions that arose under it was how the shares of the daughters were to be dealt with.

Mr. *Selwyn*, Q.C., and Mr. *Cecil Russell*, for one of the daughters, contended that, as her share was directed by the will to be "strictly settled," the income should be paid to her for her separate use during the joint lives of herself and her husband; and that if she died first, then the share should be subject to her power of appointment, and in default of appointment should go to her next of kin, and in the event of her surviving, to her absolutely.

Mr. *Southgate*, Q.C., and Mr. *Nalder*, for the same daughter's husband and children, contended that the share should be settled on the daughter for life, with remainder upon trust for her children, as in *Young* v. *Macintosh* (1).

Mr. *Baggallay*, Q.C., Mr. *Jessel*, Q.C., Mr. *W. W. Karslake*,

(1) 13 Sim. 445.

Mr. *Swanston*, Mr. *B. L. Chapman*, and Mr. *Eddis*, for other parties.

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LORD ROMILLY, M.R., held that the income of the shares of each of the testator's daughters directed by the will "to be settled on themselves strictly," should, during the joint lives of herself and her husband, be paid to her for life without power of anticipation; that if she should die in the lifetime of her husband, then her share should go as she should by will appoint, and in default of appointment to her next of kin, exclusively of her husband; and that if she should survive her husband, then the share should belong to her absolutely.

Solicitors: Messrs. *Steele & Son*; Mr. *G. W. Hussey*; Mr. *J. Shaw*; and Mr. *W. Moon*.

TURQUAND *v.* KIRBY.

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Company registered under 7 *Geo.* 4, *c.* 46—*Winding up under Companies Act*, 1862—*Suit by Official Liquidator under s.* 95—*Sanction of Court*—*Liability of Devisees of deceased Shareholder to Calls.*

A testator, who died in 1855, was a shareholder in a banking company registered under 7 Geo. 4, c. 46, and had executed the deed of settlement, under which he had, for himself and his heirs, covenanted to perform the articles. The deed provided that the representative of a deceased proprietor might either sell the shares, or become a proprietor in respect of them, and have them transferred into his own name, in which case he should execute the deed, and on his neglecting to do so for three months after notice given to him, the directors might forfeit the shares.

The testator, by his will, appointed *K.* his executor, and bequeathed to him his residuary personal estate, including his shares, and gave his real estate to him and to other devisees.

K. did not sell the shares, which remained in the testator's name; he took no steps to become proprietor, and the dividends were paid to him as executor. In 1864, the company was ordered to be wound up under the *Companies Act*, 1862, and *K.* was made a contributory. The official liquidator filed a bill on behalf of himself, and all other creditors of the testator, against *K.* and the devisees, for the administration of the testator's estate, and to enforce the calls against the real estate:—

Held, that the suit was properly instituted by the official liquidator under

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s. 95 of the *Companies Act*, by the general authority given by the Court, without any special order:

Held, also, that, notwithstanding the lapse of time since the testator's death, the real estate in the hands of the devisees was liable to the payment of the calls.

THIS was a suit by the official liquidator of the *Leeds Banking Company*, on behalf of himself and all other the creditors of *Robert Kirby*, deceased, against the executor and devisees under his will, for the administration of his estate, and to recover the amount alleged to be due to the said company.

The *Leeds Banking Company* was a joint stock company, formed under the provisions of the 7 Geo. 4, c. 46. By the deed of settlement it was provided that each shareholder should be entitled to, and interested in, the profits, and liable to the loss of the company in proportion to his shares.

The 14th clause provided as follows: "That the husband of any female proprietor, or the executor or legatee of any deceased proprietor, shall not, as such, be a qualified proprietor in respect of such shares as shall be vested in him in such capacity, but shall be at liberty either to sell and dispose of such shares, or to become a proprietor in the company in respect of such shares, on giving notice to the directors of his desire to become a proprietor; whereupon, and upon otherwise complying with the provisions of the deed, he shall be admitted and become a proprietor of such shares, and shall have the same transferred into his name. But any such executor who shall not elect to become a proprietor, shall sell and dispose of the shares vested in him in any such capacity, and shall be entitled to receive any dividends which shall have become due on such shares before his title to the same accrued; but no dividends which may have become due on the same shares after his title shall have accrued, shall be received by him."

By the 18th clause, it was provided that every representative becoming a proprietor of shares should execute the deed; and that if he should neglect to do so for three months after notice in writing should have been sent to him for the purpose, it should be lawful for the directors to forfeit his shares. The deed contained a covenant that each of the several persons parties thereto, while the proprietor of any shares, his heirs, executors, and administra-

tors, should, in respect of such shares (being and remaining part of the assets of the covenantor) observe and perform the articles by such covenantor to be observed and performed.

The testator was down to and at the time of his death the registered proprietor of twenty shares in the company, in respect of which he had executed the deed of settlement.

The testator by his will bequeathed annuities to *Maria Ward* and *Ann Smith*, and devised a portion of his real estate to *W. Goodbarne* for life, with remainder to his first and other sons in tail; and, for default of such issue, to the Defendant *William Kirby* in fee. He devised other real estate to *Ann Smith* in fee, and the remainder of his real estate to *W. Kirby* in fee. And he bequeathed the residue of his personal estate to *W. Kirby*, whom he appointed executor of his will.

The testator died before February, 1855, and his will was proved by *W. Kirby*.

After his death, *W. Kirby* intermarried with the said *Ann Smith*.

The twenty shares belonging to the testator remained standing in his name till the company was wound up, and the dividends were paid to and the receipts given by *W. Kirby*, as executor of the testator and not in his own right, and, as the bill alleged, *W. Kirby* never became in his own right proprietor of the shares, or took such steps as were required by the deed of settlement for the purpose of having the same transferred to him, or making himself proprietor thereof.

In October, 1864, an order was made for the winding up of the company under the *Companies Act*, 1862, and *W. Kirby* was settled on the list of contributories, in respect of the said twenty shares, as executor of the testator, *Robert Kirby*, and also in respect of twenty other shares, to which he was entitled in his own right.

Since the winding-up order, two calls of £70 and of £40 per share had been made on the contributories, under which, as the bill alleged, *W. Kirby* became indebted to the Plaintiff, as official liquidator, in the sum of £2200, and was liable to further sums in respect of the shares.

The bill stated that the Plaintiff had been authorized, by an order of the Court, to prosecute the suit; that the personal estate

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of the testator was insufficient to pay the amount claimed, and prayed that the real and personal estate of the testator might be administered and applied in payment of what was due to the Plaintiff and the other unsatisfied creditors of the testator.

The Defendants to the suit were *W. Kirby*, and *Ann*, his wife, *Maria Ward*, and her husband, and *W. Goodbarne*.

The Defendants *W. Kirby*, and *Ann*, his wife, by their answer, submitted that the Plaintiff had no right to sue in his own name in respect of the claim, and could not institute the suit without the sanction of the Judge before whom the winding-up took place, of which there was no evidence.

The Defendant *Goodbarne*, who was a devisee for life, submitted that *W. Kirby* being residuary legatee, and having received the dividends on the shares in his own right, and been recognised by the company as entitled in his own right to such dividends, he should be treated as the only person liable in respect of such shares, and that as between him (*Goodbarne*) and *W. Kirby*, all the real estate devised to *W. Kirby*, including the reversion of the estate of which he (*Goodbarne*) was tenant for life, was primarily liable.

Mr. *T. A. Roberts*, for the Defendants *William* and *Ann Kirby*, took a preliminary objection:—

The official liquidator cannot maintain this suit under the provisions of the *Companies Act*. By sect. 95, he has only power to sue with the sanction of the Court, and, in the case of an unregistered company, which was provided for in sects. 199 to 204, the official liquidator is empowered, by sect. 203, if the company has no power to sue in a common name, on obtaining a vesting order, to sue in his official name, "after giving such indemnity as the Court directs." In the present case the suit is not brought in the name of the company, nor is it shewn that the sanction of the Court, or any order or indemnity, has been obtained. If the suit is instituted under the Act of 7 Geo. 4, c. 46, under which the company was registered, it must be in the name of the public officer, as provided in the 9th section: *Steward* v. *Greaves* (1); *Smith* v. *Goldsworthy* (2); *Todd* v. *Wright* (3); *Barker* v. *Buttress* (4).

(1) 10 M. & W. 711.
(2) 4 Q. B. 430.
(3) 16 L. J. (Q.B.) 311.
(4) 7 Beav. 134.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the Plaintiffs :—

This objection cannot be sustained. The suit is not instituted under the 7 Geo. 4, c. 46, but under the *Companies Act*, 1862. The provisions of sect. 203, by which a vesting order may be made to vest the property of an unregistered company in the official liquidator, who is then enabled to sue, do not apply to a suit for enforcing calls, but to suits for recovering the property of the company. By sect. 200 the liability of the contributory of an unregistered company is determined, and by sect. 204 all the provisions before contained as to unregistered companies are to be deemed to be in addition to and not in restriction of any provisions before contained with respect to winding up companies, thus carrying us back to sect. 95, which expressly provides that the official liquidator may sue "in the name and on behalf of the company," and also that, "in all cases where he uses his official name for obtaining payment of any moneys due from a contributory, such moneys shall, for the purpose of enabling him to recover such moneys, be deemed to be due to the official liquidator himself." In sect. 76, the liability of the devisees or representatives of deceased contributories is determined. Then, in sect 102, the company is empowered to make calls, which, by sect. 103, may be enforced in the same manner as if payment had been directed to the official liquidator; and, under sect. 105, proceedings may be taken for administering the estate of a deceased contributory whose representative is made a contributory, and has made default in paying any sum ordered to be paid by him. The official liquidator can, therefore, properly sustain the present suit in his own name.

Mr. *Roberts*, in reply.

LORD ROMILLY, M.R. :—

I am of opinion that the objection cannot be sustained. If an official liquidator has not proved that he had the authority of the Court for the purpose of instituting such a suit, that is a matter which I would allow him to prove at the hearing, because it is a matter that cannot be contested, and could be easily proved. The objection has been taken several times before me in Chambers, and I have said, "When I appoint an official liquidator, I always give

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him a general authority in all cases wherever a contributory has been fixed upon the list and has not applied to have his name taken off, and there is a balance-order made against him for the sum due from him, to proceed against that contributory." I assume that to be so here, for in all these cases I give the official liquidator leave to take all the steps that are necessary for the purpose of getting in what is due to the company, without coming to the Court to ask for leave in every case. I am of opinion that the 95th section does allow that to be done by the official liquidator in his own name. The first clause is for getting in property belonging to the company itself before the winding-up order is made. In all such cases he must sue in the name of the company, and where the company is sued he must defend in the name of the company; but where, in the course of winding up, he endeavours to get from a contributory the amount of his contribution, in those cases the official liquidator may sue also with the sanction of the Court, and the sanction of the Court I have always given to the official liquidator for that purpose.

The case was now argued on its merits.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the Plaintiff:—

In this case the calls are a charge on the real estate of the testator. It is true that he died many years before the winding-up order, but, under sect. 75 of the Act, the liability of any person liable to contribute to the assets of a company is to be deemed to create a debt of the nature of a specialty, accruing due from such person at the time when his liability commenced, and this must be considered to apply to a person deemed a contributory, under sect. 200, of an unregistered company. The testator's liability, therefore, accrued when he took the shares and executed the deed of settlement. In *Ex parte Canwell* (1) it was held that in the case of a winding-up under the *Companies Act*, 1862, a call was a debt due at the time when the contributory executed the deed of

(1) 33 L. J. (Bank.) 26; 10 Jur. N. S. 480; 4 De G. J. & S. 539.

settlement, if it was executed prior to the Act of 1861, and in *Williams* v. *Harding* (1), which was an appeal from the decision of *In re Williams*, a case decided at the same time as *In re Canwell* (2), Lord *Kingsdown* observed (3), "The *Companies Act* has removed all doubt about subsequent cases by expressly declaring that the call shall constitute a debt as from the time when the liability was contracted."

In *Hamer's Devisees' Case* (4), where a testator, who was a shareholder in a joint stock company, gave his real and personal estate to his wife for life, and afterwards to his daughter, and appointed them his executrixes, in which capacity they received the dividends on his shares, the company having been wound up after the death of the widow, the daughter was held to be properly made a contributory as devisee. There, as here, the shares had stood for a long time in the testator's name. Lord *St. Leonards* observed in his judgment (5), "It may, undoubtedly, be very hard to compel devisees, under the circumstances of this case, to satisfy these losses, but if the testator's estate is legally liable, the Court cannot do otherwise than give effect to such liability." The deed of settlement of this company provides for the case of the executor of a deceased proprietor, who may either elect or not elect to become a proprietor in respect of his testator's shares. *W. Kirby* had given no notice to make himself a proprietor, and though he received the dividends, yet they were paid to him, and he gave receipts for them, as distinguished from his own shares, not in his individual character, but as executor.

It is not necessary, in order to recover against the devisees, to place them on the list of contributories. By the 76th section the devisees of a deceased person liable to be made a contributory are made liable, and sect. 99 declares that it is not necessary where the personal representative of a deceased contributory is placed on the list to add the heirs and devisees of such contributory: then, under sect. 105, the real and personal estate of such contributory may be administered. This is a liability contracted by the testator in his lifetime, therefore, under 3 & 4 Will. 4, c. 104, his real estate

(1) Law Rep. 1 H. L. 9. (3) Law Rep. 1 H. L. 29.
(2) 33 L. J. (Bank.) 26. (4) 2 D. M. & G. 366.
(5) 2 D. M. & G. 371.

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is chargeable with the amount. The Plaintiff is a creditor, and is, therefore, entitled to a decree in the same way as any other creditor.

Mr. *Roberts*, for the Defendants *W. Kirby* and his wife:—

There is no doubt as to the liability of the executor, but I contend that no liability attaches to the devisees or the annuitants under the will. Where a shareholder has given landed property to devisees, who have enjoyed it for many years, they cannot be made liable for losses sustained by the company after the testator's death, simply because the executor has allowed the shares to remain in the testator's name. By sect. 13 of 7 Geo. 4, c. 46, no execution can be issued under a judgment against any member of a co-partnership registered under that Act after the expiration of three years from the time when such person ceases to be a member of the co-partnership. In *Barker* v. *Buttress* (1) the claims of creditors against a member of a banking company established under the Act were held to be barred by the lapse of three years after his death. It may be said that the liability was kept alive by the executor receiving the dividends, but this cannot affect third parties, or render the devisees liable.

Mr. *Selwyn*, Q.C., and Mr. *C. Hall*, for the Defendant *Goodbarne*:—

The company, which was a banking company, cannot acquire any additional right against a devisee of a deceased shareholder by reason of its being wound up. It cannot, while continuing to pay the dividends to the executor, be reserving a liability for others.

It was the duty of *W. Kirby*, who was beneficially entitled to the shares under the testator's will, to have them transferred into his name, under the fourteenth clause of the deed of settlement, and it was the duty of the directors under the eighteenth clause of the same deed, if *W. Kirby* neglected to execute the deed, or to dispose of the shares within three months after notice to do so, to take one of these courses,—either to cause the shares to be transferred to him, or, on his failing to execute the deed of settlement, to declare his shares forfeited. If either of these things had been

(1) 7 Beav. 134.

done, as provided by the deed, the liability of the devisees would have ceased long before the claims consequent on the winding up of the company had arisen. The official liquidator cannot now take advantage of this neglect on the part of the directors, nor is he in a better position because the directors allowed the executor to receive the dividends, which, as he neglected to comply with the provisions of the deed, he had no right to receive at all. The company suffered the shares to remain as they were, but, by so doing, they could not keep alive the liability of the devisees.

Mr. *Baggallay*, Q.C., and Mr. *Archer Shee*, for the Defendants Mr. and Mrs. *Ward*:—

This claim cannot, after this lapse of time, be enforced against the devisees, who cannot be presumed to know that the testator was a shareholder, and that any liability arising therefrom would ultimately fall upon them. The testator died seven years before the passing of the *Companies Act*. There is nothing in that Act to make it retrospective, so as to affect the devisees of a shareholder in a company who had previously died. *Hamer's Devisees' Case* (1) is distinguishable, because there the person made liable was executrix as well as devisee, and it was through her laches, by allowing the shares to remain in the same position as at the time of the testator's death, that the liability arose.

The deed of settlement of this company must be taken as a whole, and as a contract between the parties, and if its provisions are strictly to be enforced against the devisees of a deceased shareholder, they have a right to insist on the correlative obligations of the directors, which have not been fulfilled by their allowing the shares to remain as they did. The testator had a right to consider that his shares would be so dealt with as, under 7 Geo. 4, c. 46, to free his real estate from liability at the end of three years. It cannot be disputed that *W. Kirby* is a contributory, but as against the devisees we contend that the bill should be dismissed.

Mr. *Kekewich*, in reply:—

An application has already been made for the sanction of the

(1) 2 D. M. & G. 366.

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Court to the prosecution of this suit by the official liquidator, and an order made, which is not yet drawn up. But it is not necessary to obtain any special order for that purpose.

In the analogous case of an action brought by assignees in bankruptcy, without first obtaining the leave of the Court, it has been held that the absence of such leave is no bar to the action: *Lee* v. *Sangster* (1).

The case of *Barker* v. *Buttress* (2), does not apply, for there an administrative decree had been obtained by legatees, and certain creditors of the bank came in before the Master to prove against the estate of the deceased shareholder. Here the official liquidator represents the contributories as well as the creditors. Under the deed of settlement the heirs are clearly bound by the covenants between the parties, and unless the devisees can get rid of their legal liability, which they cannot do, they are bound to submit to an administration decree, whatever may be the equities of the parties as between themselves.

April 16. LORD ROMILLY, M.R.:—

This is a suit by the official liquidator of the *Leeds Banking Company*, which is in the course of being wound up under the order of the Court. The object of it is to make the estate of *Robert Kirby* answerable to pay the calls due on the shares in the company held by him at his death. The suit is instituted by the official liquidator on behalf of himself and all the creditors of *Robert Kirby* deceased, against the executor and the persons interested under his will seeking the administration of his estate.

An objection was taken at the hearing of the cause, that the suit was not properly instituted in accordance with the provisions of the Act of 7 Geo. 4, c. 46, under which the *Leeds Banking Company* was incorporated, but I overruled that objection at the hearing, and reserved my judgment on the merits of the case which were argued before me.

The real question to be decided is, whether the estate of the testator generally is liable to pay the amount of the calls on the

(1) 2 C. B. (N.S.) 1; 3 Jur. N.S. 444 (2) 7 Beav. 134.

shares he possessed, a question which is much mixed up with the question of time. The only material facts are these:—[His Lordship then stated the facts of the case.]

The case against *William Kirby* is quite clear, and is only the ordinary case of a shareholder in a joint stock company that fails, but as regards the devisees of *Robert Kirby* the case is different. This is unquestionably a very unfortunate instance of the calamities inflicted by the reckless management and consequent failure of these large commercial companies, for in this case the devisees had nothing to do with the shares, and had no interest in them, but I regret to say that I do not see any mode by which I can relieve the estate of the testator from the liability to pay these calls. He, by taking the shares, made himself liable to all the consequences that might result from a failure of the company, and as long as the shares remain standing in his name in the books of the company, I am of opinion that his estate is liable to pay the calls.

The defence raised, and principally relied upon by the Defendants, is that the shares are, by virtue of the contents of the will of *Robert Kirby*, really the property of *William Kirby*, the beneficial owner, and that it was his duty to cause them to be transferred into his own name, and that it was the duty of the directors of the company to cause the shares to be transferred, either to him, or to some purchaser thereof, within a reasonable time after the death of the testator, and that not having done so the directors cannot take advantage of their own default and affect this property of the testator in the hands of his specific devisees. For this purpose the Defendants principally rely on the 14th and 18th sections of the deed of settlement of the company, and under these, but particularly the latter, it is contended that the company had three courses open to them, one of which they were bound to adopt. They were empowered, within three months after the death of the testator, to call upon the executor either to cause the shares to be transferred into his own name and to execute the deed, or to cause the shares to be transferred into the name of some third person who would execute the deed, or, in default of the executor taking either of these courses, to forfeit the shares. But upon referring to the clause in question, I find nothing compulsory on the directors. They are empowered to compel the executor to

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adopt one of these courses, but they are also at liberty to dispense with so compelling him, and I am unable to draw any line at which time should operate so as to bar the claim of the company. It is clear that the *Statute of Limitations* has nothing to do with the case; for the debt did not arise till the call was made. It is true that the debt did not exist when the testator died, but in that respect it does not differ from the cases where a testator has in his lifetime become surety for the due performance of a covenant which is broken many years after his death, or where, as in the case of *Knatchbull* v. *Fearnhead* (1), executors of a deceased trustee are held chargeable, long after his death, with the loss occasioned by a breach of trust committed by him; and I cannot, on the clauses of the deed, hold that the liability of the testator's estate ceased three months after his death, nor can I draw the line at the end of any subsequent month until the transfer has taken place in the books of the company.

As between the persons interested under the testator's will the property of *William Kirby* is primarily liable, but as regards the company, I am of opinion that all the property of the testator not in the hands of a purchaser for value before the date of the winding-up order, is liable to make good the amount due on the calls.

I must make the usual administration decree, but there will be no claim against the Defendants, other than *W. Kirby*, except in respect of the property derived from the testator.

Solicitors for the Plaintiff: Messrs. *Freshfields & Newman.*

Solicitors for the Defendants: Mr. *F. Hatton;* Messrs. *Torr, Janeway, & Tagart,* agents for Mr. *T. Simpson, Leeds,* and for Messrs. *Pearson & Hawdon, Selby.*

(1) 3 My. & Cr. 122.

In re BLAKELY ORDNANCE COMPANY.

NEEDHAM'S CASE.

M. R.
1867
June 3.

Company—Winding-up—Contributory—Forfeiture of Shares—Unpaid Calls—Present and past Members.

The articles of association of a company provided that the forfeiture of a share should involve the extinction of all interest in, and all claims against, the company in respect of the shares; but that any member whose shares had been forfeited should be liable to pay to the company all calls owing on such shares at the time of such forfeiture:—

Held, that the former owner of forfeited shares could not be placed on the list of contributories as a present member, in respect of the calls owing on his shares at the time of forfeiture.

No person can be settled on the list of contributories as a past member until it has been actually ascertained that the present members are unable to satisfy the contributions required to be made by them.

6 E. 19.
6 L. 584

MR. *NEEDHAM* was the holder of 100 shares in the *Blakely Ordnance Company, Limited*. These shares were sold by him in July, 1865, but no transfer thereof was ever registered, and in November following they were forfeited for non-payment of calls. Within a year after the forfeiture the company was ordered to be wound up.

The material parts of the articles of association are the following:—

"48. After one month's non-payment of any call in respect of any share, the board may declare the share forfeited for the benefit of the company.

"50. The forfeiture of any share shall involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against the company in respect of the share, and all other rights incident to the share; but any member whose shares have been forfeited shall, notwithstanding, be liable to pay to the company all calls owing on such shares at the time of such forfeiture.

"51. Forfeited shares may be sold, or absolutely extinguished, by the board, as they shall deem most advantageous to the company."

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It did not appear that any resolution was ever passed by the board, either for the sale or for the extinction of the forfeited shares.

The official liquidator now sought to place Mr. *Needham* on the list of contributories in respect of the calls for the non-payment of which the shares were forfeited; or, if this could not be done, as a past member of the company; and he deposed, that, having regard to the debts and liabilities of the company, and the assets available to meet and discharge the same, and also having regard to the probability of the persons registered as the existing holders of shares in the company being wholly unable to meet the calls which would be made upon them, it would, in his judgment, become essentially necessary to settle the list of contributories as regards past holders of shares, under the 38th section of the *Companies Act*, 1862.

Mr. *Baggallay*, Q.C., and Mr. *J. Napier Higgins*, in support of the application:—

First: Forfeiture does not deprive the company of the right to insist on payment of calls owing at the time of forfeiture. In this respect the case is distinguishable from *Knight's Case* (1), where the articles of association contained no provision such as is found here. In respect of these calls, Mr. *Needham* is liable to contribute to the assets of the company; he falls, therefore, within the definition of a contributory (sect. 74), and ought to be placed on the list of contributories as a present member.

Secondly: The forfeiture having taken place within twelve months prior to the commencement of the winding-up, Mr. *Needham* is liable to be placed on the list as a past member.

The MASTER OF THE ROLLS:—It is quite clear that Mr. *Needham* is not a contributory in respect of the calls owing on his shares at the time of forfeiture.

Mr. *Jessel*, Q.C., and Mr. *Martineau*, for Mr. *Needham*:—

First: The Act does not provide for any person being made a contributory in respect of forfeited shares. Forfeiture extinguishes the shares, and after forfeiture no further demand can be made in

(1) Law Rep. 2 Ch. 321.

respect of them. The only clause in the Act which reaches the case is the 4th clause of sect. 38, which provides that no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member. Here the word "unpaid" implies that payment might be called for.

Secondly: Even if Mr. *Needham* is liable as a past member, he cannot be placed on the list at present; he is not liable until all the present members are exhausted (sect. 38, clause 3; sect. 74). If the list of contributories be settled so as to include past members, great expense may be incurred for no purpose, as the past members may never be liable. Questions of very great difficulty will arise when the list of contributories as past members comes to be settled. Thus, suppose all the present members satisfy their contributions except one, may a past member pay the contributions of that one, or will the creditors be allowed to go against the past members? Again, suppose there have been eight or nine transfers in the course of the year prior to the commencement of the winding-up, what is the liability of the several transferees? The expense of settling all these questions may give rise to an amount of costs which may ultimately render it necessary to have recourse to the past members, whereas if the list of present members had been settled in the first instance, and calls made on them only, it is possible that all the debts of the company and the costs of the winding-up might be paid without having recourse to the past members.

Mr. *Baggallay*, in reply, referred to sect. 98, as shewing that a complete list of contributories was to be settled at once, and stated that this was a representative case, and ought to be decided on its merits, and not on any point of form.

LORD ROMILLY, M.R.:—

I am of opinion that the time for determining this question is only when it has been ascertained that the list of contributories, as it is usually called, has failed in doing that which it is required to do. You can always say that every one on that list will not pay in full the call made upon him; but they may pay enough to satisfy all the debts of the concern, and if they do

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that, a past member cannot be called upon at all. Settling the list of past contributories raises questions of considerable nicety and difficulty, and may also give rise to a great deal of expense. In these cases I have quite enough to do now in settling the list of contributories before a call is made, and before a division of the assets; and by acceding to the present proposition I should make it still more difficult. A call is now never made until the list of contributories is settled, and the argument is, that the list of contributories means past as well as present contributories; but why should I delay to make a call till the list of past contributories is settled? The list of present contributories is all that you require for the purpose of making a call. I do not think, therefore, that the objection that Mr. *Jessel* has taken, that this is not the right time for determining this question, is a mere technical objection. It appears to me to involve substance in it, and it also appears to me very desirable that you should not proceed any further until you have ascertained what the present contributories can do; and, therefore, I shall dispose of this application by saying that the time has not arrived for determining this question.

Solicitors for the Official Liquidator: Messrs. *Lewis, Munns, Nunn, & Longden.*

Solicitors for Mr. *Needham*: Messrs. *Cunliffe & Beaumont.*

M. R. 1867 *May* 8.

In re GENERAL EXCHANGE BANK.

Winding-up—Costs of Petition and Order—Order for Payment to Petitioner while a Debtor to the Company for Calls.

6 C.L.D. 103.

Where a winding-up order has been made on the Petition of a shareholder who is afterwards made a contributory, he is entitled to the costs of the Petition and order, though a debtor to the company in respect of calls, without having the amount of such calls set off against the costs.

THIS was an application by a person who had petitioned for and obtained a winding-up order, which was made on the 30th of July, 1866, that the official liquidator might be ordered to pay him his costs of the Petition and order, which had by the order been

directed to be taxed and paid. The applicant had been made a contributory, and was a debtor to the company in respect of calls.

Mr. *Baggallay*, Q.C., and Mr. *Graham Hastings*, in support of the motion.

Mr. *Lindley*, for the official liquidator:—

While the applicant is a debtor to the company in respect of calls, he is not entitled to receive the costs, though they were directed to be paid by the order, but the amount of the calls due from him ought to be set off against the costs. In *Cattell* v. *Simons* (1), Lord *Langdale* held that one set of costs ordered to be paid to a Defendant under one order should be set off against another set of costs due from the same Defendant under another order, and that he could not enforce the one without paying the other.

Lord Romilly, M.R.:—

I look at the costs of a winding-up order as distinguished from others. It is an order for the benefit of everybody concerned, and you are all proceeding under it. The Court, when the order is made, knows nothing about the proceedings which will take place under it, or who will be debtors or creditors. If it were merely to say that no contributory should have the costs of a winding-up order until the list of contributories was made out, and it were ascertained whether calls were due from him, and then set off the one against the other, the result, practically, would be that you would make it difficult for a contributory to come to the Court at all for a winding-up order. This money is, in fact, paid to the solicitor. It is not alleged here that the contributory is in insolvent circumstances, or unable to pay. I am not sure that I should regard it if he were. I think the costs of a winding-up order which the Court directs to be made, should be paid in the first instance. I look upon these costs in a different point of view from what I should do if they were costs incurred for the exclusive benefit of a single person who was a contributory of the company, and who might be liable to pay calls, in which

(1) 6 Beav. 304.

M. R. 1867 *In re* General Exchange Bank.

case a balance order would be made against him. I am, therefore, of opinion that the costs of the Petition, the hearing in Court, and the winding-up order, with the costs of the present application, ought to be paid without a set-off.

Solicitors for the Applicant: Messrs. *Deane & Chubb.*

Solicitors for the Official Liquidator: Messrs. *Lawrance, Plews, & Boyer.*

M. R. 1867 *March* 14, 15, 20.

HODGES *v.* GRANT.

Will—Demonstrative Legacy—Gift to Children and Issue of deceased Children equally to be divided between such Children and Issue—Tenancy in Common.

A testatrix appointed her real and personal estate to trustees upon trust to sell part thereof, and hold the proceeds and all the trust moneys and personal estate upon trust to pay the legacies thereinafter given, and after payment thereof, to pay an annuity to *P.* for life, unless he should become entitled to the legacy thereinafter mentioned, and, subject thereto, in trust for *H.* for life; and after her death, in trust to sell the estates not already sold, and out of the proceeds to pay to *P.*, his executors, administrators, and assigns, the sum of £20,000 in lieu of the annuity, and hold the residue in trust for all the children of *G.* who should be then living, and the issue of such of the children of *G.* as should be then dead leaving issue, equally to be divided between such children and issue, but so that the issue of such children should take only such share as their respective parents, if living, would have been entitled to.

P. died in the lifetime of *H.*, and on the death of *H.* the real estate remaining unsold was insufficient to raise the sum of £20,000:—

Held, that the sum of £20,000 was a demonstrative legacy, and payable out of the general estate to *P.*'s representative:

Held, also, that the issue of deceased children of *G.* took shares in the residue as tenants in common, and not as joint tenants.

The case of *Fream* v. *Dowling* (1), as varied on appeal, commented on.

MARIA POWELL, the wife of *Peter Powell*, the testatrix in the cause, had a power of appointment by will over an estate at *Over*, the proceeds of the sale of an estate at *Ditchford*, an estate at *Warwick*, and an estate at *Lyme Regis*, and also over certain personal estate.

By a will made in 1815, in execution of the power, the testatrix

(1) 20 Beav. 624.

directed and appointed that the estate at *Over* (subject to a life interest therein), and the moneys to arise from the estate at *Ditchford*, and the rents till sale, and all other the freehold estates and trust moneys over which she had disposing power, should be conveyed and assigned so as to be vested in the trustees of the will upon trust to sell her estate and houses at *Warwick* (with certain exceptions) "and as to the money to arise from the sale, and all other the said trust moneys, personal estate, and effects, in trust to pay the costs of conveying the said estates, the legacies hereinafter by me directed and appointed, given and bequeathed, and after payment thereof upon trust that the trustees shall invest the amount" as therein mentioned. And as to all the said trust moneys, personal estate, and the stocks on which the same should be invested, and also as to all the estates before appointed and not thereinbefore directed to be sold, upon trust (among other things) as follows: "to pay to my husband, *Peter Powell*, an annuity of £200 during his life, unless he shall become entitled to the sum of £20,000, hereinafter directed to be paid to him in the event hereinafter mentioned, in which event I direct that the annuity shall be no longer payable to him;" and also upon trust to pay certain other annuities, and, subject thereto, upon trust to pay the income to *Henrietta Cartwright* (the daughter of the testatrix) for life, and after her death, upon certain trusts for the benefit of her children, and in default of such children, then upon the following trust:—

"That the trustees shall sell all the freehold and copyhold estates hereinbefore directed and appointed (and which shall not have been already sold under the trusts of this my will), and shall, out of the moneys to arise by the sale thereof, pay to my husband, *Peter Powell*, his executors, administrators, or assigns, the sum of £20,000, in lieu of the said annuity of £200 hereinbefore directed to be paid to him as aforesaid.

"And as to the residue of the money to arise by such sale or sales as aforesaid, and also as to all other the trust moneys hereinbefore mentioned, which shall remain undisposed of for the purposes of my will, upon trust to make over the same unto and among all the children of *James Grant* who shall be then living, and the issue of such of the children of the said *James Grant* as shall be then dead, having left issue living at the time of their

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respective deaths, equally to be divided between such children and issue, share and share alike, but so that the issue of such children respectively shall take only such share as their respective parents would, if living, have been entitled to."

The testatrix died in 1819. *Peter Powell* died intestate in 1860, leaving *Henrietta Cartwright* surviving, who died in 1865 without having had any children, and at her death the estates at *Over* and *Lyme Regis* were the only estates subject to the will of the testatrix which remained unsold.

The suit was instituted by the trustees of the will to have the rights of the persons interested under it declared, and one of the questions before the Court was, whether the legacy of £20,000 given to *Peter Powell* was now raiseable, and, if so, whether it was a demonstrative legacy, payable out of the testatrix's general estate, or whether it was payable out of the particular estates at *Over* and *Lyme Regis* which remained unsold.

George Cartwright, one of the Defendants, as the representative of *Peter Powell*, claimed to be entitled to the legacy as a demonstrative legacy, the real estates remaining unsold being insufficient to produce it.

There was a further question, on the construction of the gift of the residue to the children of *James Grant*, and their issue, whether the issue of deceased children were entitled to take as tenants in common or as joint tenants.

Janet Oakley, one of the daughters of *James Grant*, died in 1840, leaving three children, two of whom, *Mary Oakley* and *George Oakley*, survived their mother and predeceased *Henrietta Cartwright*: the third, *Jessie Rogers*, was still living. *George Daniel Oakley*, the representative of *Mary* and *George Oakley*, contended that they were entitled to participate in the residue. *Jessie Rogers* claimed to be entitled to the whole of her deceased mother's share.

Mr. *E. F. Smith*, Q.C., and Mr. *Davey*, for the Plaintiffs.

Mr. *Southgate*, Q.C., and Mr. *F. H. Colt*, for some of the residuary legatees:—

The legacy of £20,000 to *Peter Powell* is not raiseable at all, in consequence of his death in the daughter's lifetime: *Shuttleworth*

v. *Greaves* (1). If it is raiseable, it is only payable out of the estates remaining unsold at the death of *Henrietta Cartwright*, namely, the *Over* and *Lyme Regis* estates. The general trust to pay "the legacies" thereinafter given, does not apply to the £20,000, which is not described as a legacy, and was only payable on a future event. A general trust for payment of legacies may be cut down by subsequent words. In *Fream* v. *Dowling* (2), where there was a trust in a will for sale of certain real estate, and out of the money to arise therefrom in the first place to pay certain legacies, and then to apply the residue as in the will directed, your Lordship held that the legacies were payable solely out of the real estate, but the decree was varied on appeal by the Lords Justices.

In *Gordon* v. *Duff* (3), which was affirmed on appeal (4), a bequest of £2,000 long annuities, described as standing in the name of a testatrix who had only £300 of that stock, was held to be specific, and not demonstrative. In *Spurway* v. *Glynn* (5), which was a very similar case to this, a devise of a particular estate upon trust to raise and pay a sum to *A.* was held to be an exclusive charge, and not exonerated by a subsequent direction for the application of the personal estate to the debts and legacies in exoneration of the real estate before charged. In *Gittins* v. *Steele* (6), the general personal estate of a testator was exempted from the payment of a particular legacy which was charged by the will on all the freehold and leasehold estate. *Jones* v. *Bruce* (7), and *Roberts* v. *Roberts* (8), were similar decisions.

The result is that this legacy, if raiseable at all, is only payable if and when the particular estates on which it is charged become saleable, and can only be raised out of the proceeds of those estates. If the purchase-money should prove insufficient, the legacy must abate.

Mr. *Selwyn*, Q.C., and Mr. *Dauney*, for *Jessie Rogers*:—

Under the residuary gift in the will to the children of *James Grant* and the issue of deceased children, we contend that the

(1) 4 My. & Cr. 35.
(2) 20 Beav. 624.
(3) 28 Beav. 519.
(4) 3 D. F. & J. 662.
(5) 9 Ves. 483.
(6) 1 Sw. 24.
(7) 11 Sim. 221.
(8) 13 Sim. 336.

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children only take as tenants in common, and the issue of deceased children as joint tenants.

In *Bridge* v. *Yates* (1), where the residue was to be equally divided among all the testator's children who should be then living, and the issue of such of them as should be dead, such issue taking only the deceased parent's share, it was held that, as the testator spoke of no division among the issue themselves, the children of a deceased child took their deceased parent's share as joint tenants.

So in *Penny* v. *Clarke* (2), where the trust after the death of the tenant for life was "for all the children who shall be living at her decease, and the issue of such of them as shall be then dead, leaving issue, as tenants in common; but the issue, if more than one, of any deceased child to take as a class, as if by representation, and not as individuals;" in that case it was held that the issue of deceased children took, *inter se*, as joint tenants. In *Leak* v. *Macdowall* (3), under a gift to the testator's nephews and nieces, or to such of them as should be living at his death, but if any should be then dead, their offspring were to be considered to stand in the place of their parents, and to take the same benefits, it was held that, though the nephews and nieces took as tenants in common, their offspring took as joint tenants.

In *Coe* v. *Bigg* (4) the tenancy in common was held to be confined to the original takers, and not to extend to the issue.

On the question of the legacy to *Peter Powell*, we support the contention that it is not raiseable, or, if raiseable at all, that it is a charge on the particular estates.

Mr. *Baggallay*, Q.C., and Mr. *E. R. Turner*, for *George Daniel Oakley*, the representative of the deceased children of *Janet Oakley*:—

The issue of deceased children of *James Grant* took as tenants in common.

[The MASTER OF THE ROLLS:—You cannot get over the words "equally to be divided between such children and issue, share and share alike," for the words apply to the issue as much as to the children.]

(1) 12 Sim. 645.
(2) 1 D. F. & J. 425.
(3) 32 Beav. 28.
(4) 1 N. R. 536.

On the other question, the representative of *Peter Powell* cannot take the legacy in addition to the annuity which he enjoyed during his life. The direction to pay to him, "his executors, administrators, and assigns," merely denotes an intention that the legacy was to be given absolutely. The case of *Fream* v. *Dowling* (1) is not reported on appeal, but it would appear from a note of the case that your Lordship's decision on that part of the will on which the case is reported was not overruled (2).

(1) 20 Beav. 624.

(2) A note of the judgments of the Lords Justices in the case of *Fream* v. *Dowling*, by Mr. *Cadman Jones*, was handed to the Master of the Rolls by Mr. *E. R. Turner*. The following are their Lordships' judgments, delivered on the 22nd of December, 1855, as reported by Mr. *Cadman Jones*—

SIR J. L. KNIGHT BRUCE, L.J.:—

There are some particular passages in this will which seem, considered separately, to be favourable to the Plaintiff's contention; but, on the whole will, an intention is, in my judgment, discoverable, that all the personal, as well as the real, estate of the testator should be subjected, in some order or course, to the payment of his legacies.

SIR G. J. TURNER, L.J.:—

If this case had turned on the authorities, I should have wished to take time to consider them. But each will must be judged of by itself, and in the present case I think that the construction of this particular will makes the consideration of the authorities unnecessary. The testator deals with three funds—uninvested personal estate, invested personal estate, and moneys arising from the sale of real estate. He directs his debts to be paid "in the first place" out of the uninvested personalty. Now, he must have known that all his personalty was subject to his debts, and could not be exempted from its liability to them. I think, therefore, that by the words "in the first place," he must have intended to make the uninvested personal estate the primary fund for payment of them. He assumes that there will be a surplus of uninvested personal estate after payment of debts. This he directs to be invested, and then the wife is to receive the income of everything for her life. On the decease of his wife, he directs the trustees to sell his real estate, and out of the proceeds, "in the first place," to pay certain legacies. The words "in the first place," must, I think, receive the same construction in this part of the will as in the former, and be taken to mean "as the primary fund." He then proceeds on the assumption that there will be a surplus of the proceeds of sale. It turns out that there is no surplus, but a deficiency. Was it, then, his intention that, in the case of a deficiency, the legatees should lose their legacies? I think not; for in the clause defining what the residuary legatees are to take, he describes it as "the rest, residue, and remainder of the produce of his said real and personal estate." I think that if legacies had been given out of personal estate, and then a residuary clause in terms similar to these had followed, the legacies would have been held to be charged on the real estate in aid of the personal estate. I am of opinion, therefore, that the deficiency in the present case is to be paid out of the personalty.

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Mr. *Jessel*, Q.C., and Mr. *Wickens*, for the representative of *Peter Powell*:—

[The MASTER OF THE ROLLS:—I only wish to hear you on the question, whether the sum of £20,000 was a demonstrative legacy, not on the question whether the sum was raiseable.]

This is the will of a married woman who had a power of appointment over particular property. The word "after," in the clause "after payment thereof," that is, "after payment of the legacies hereinafter bequeathed," is an adverb of priority, and the meaning is "subject to the payment of the legacies." This applies to every legacy bequeathed by the will, including the sum of £20,000, and it cannot be contended that that is excepted because it is called "a sum," and not in express terms "a legacy," nor because it is payable on a future event. It was urged on the other side that a general charge of legacies cannot take effect if they are afterwards directed to be paid out of a particular estate, but there is no authority for such a proposition. "A charge created by general introductory words is not controlled by a subsequent passage furnishing conjecture only of a contrary intention, and not actually inconsistent with such charge:" *Jarman* on Wills (1).

In *Jones* v. *Williams* (2) the effect of a general charge at the commencement of a will was held not to be cut down by subsequent words. In *Thomas* v. *Britnell* (3), where there was a general charge of debts, then a devise of particular estates on trust for payment of debts, except two estates which were first to be applied in payment of legacies, though the excepted estates were held to be free from the charge of debts, yet it is clear from that decision that, as to the other particular estates, the charge of debts would not have been cut down by the subsequent words; and on the same principle, if, in the present case, the trust had been to pay debts instead of legacies, it would not have been cut down by their being made a charge on the particular estates. The cases of *Taylor* v. *Taylor* (4), and *Forster* v. *Thompson* (5), were cases of charge of debts only, but the distinction between debts and legacies is now exploded.

(1) 3rd Ed. vol. ii. p. 562.
(2) 1 Coll. 156.
(3) 2 Ves. Sen. 314.
(4) 6 Sim. 246.
(5) 4 D. & War. 303.

[THE MASTER OF THE ROLLS:—The sole question is, whether this is a direction to pay the legacy out of the proceeds of the sale of the particular estates, or whether it is a general legacy.]

In *Hassel* v. *Hassel* (1), where there was a gift of legacies, and then a general gift of all the testator's real and personal estate not before disposed of, the legacies were held to be a charge on the real estate. There is a line of cases to the same effect collected in *Jarman* on Wills (2), culminating in *Greville* v. *Browne* (3).

The principle of this case is further illustrated by *Fowler* v. *Willoughby* (4) and *Bevan* v. *Attorney-General* (5). The result is, that the general charge of legacies overrides the subsequent charge on the estates remaining unsold at the death of the daughter, that the £20,000 is a demonstrative legacy, and that the gift of the residue is subject to that legacy.

March 20. LORD ROMILLY, M.R.:—

This is a question upon the construction of a will. The question is, whether a sum of £20,000, which was given to the husband of the testatrix by her will, which she executed under a power, is a legacy in the nature of a demonstrative legacy—that is, a legacy to be paid out of a particular estate, and if that estate should be insufficient, then to be paid out of the general personal estate of the testatrix,—or whether it is solely charged upon that estate, so that if the estate should fail in producing a sufficient amount to raise the £20,000, the legacy must abate in proportion.

Another question was raised before me, whether there was any gift at all to the husband unless he survived the daughter. I stopped Mr. *Jessel's* argument upon that point, being of opinion that that was quite clear; but I will notice it presently.

I am of opinion that this is a demonstrative legacy, and that it must be paid out of the general assets of the testatrix; and I am of that opinion principally by reason of the trust which is contained in the early part of the will. There were four pro-

(1) 2 Dick. 527.
(2) 3rd Ed. vol. ii. p. 572—574.
(3) 7 H. L. C. 689.
(4) 2 S. & S. 354.
(5) 4 Giff. 361.

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perties dealt with by the will,—one in *Warwick;* the *Ditchford* estate; the *Over* estate, in which there was a life interest; and the *Lyme Regis* estate. After directing the trustees to dispose of her estate at *Warwick,* she directs that they shall hold the money to arise from the sale thereof, "and all and every other the said trust moneys, personal estate, and effects" (including everything over which she had disposing power, except certain chattels), in trust to pay the costs of conveying the several estates; "and the legacies hereinafter by me directed, limited, appointed, given, and bequeathed; and after payment thereof," then in trust to invest.

I am of opinion that this is a trust to pay all the legacies hereinafter mentioned, and that the particular legacy to the husband of the testatrix is a legacy within the meaning of those words. There is no question but that it would include every subsequent legacy, unless by the words which are used in the gift of the legacy it is itself excepted. The testatrix then states the trusts, namely, "to pay to my husband a yearly sum of £200 during his life, unless he shall become entitled to the sum of £20,000 hereinafter directed to be paid to him in the event hereinafter mentioned, in which event I direct that the said annuity of £200 shall cease, and be no longer payable to him." She then gives some other legacies. It was argued that the husband was not to become entitled to the legacy at all unless he survived the period subsequently pointed out; but I am of opinion that the testatrix only meant, that if he received personally the £20,000, then the £200 per annum was to cease; but that if he received the £200 per annum during his life, and died before the legacy became payable, still his right to the legacy was not affected.

The legacy itself is thus given:—The property is given to the daughter for her life, and after her decease then to her children, and if there are no children, upon trust: [His Lordship then stated the clause containing the trust for raising the sum of £20,000 for the husband.]

What is meant by the direction to pay it to him, "his executors, administrators, and assigns"? It is clear that it is to be a payment to him, if alive, and if he is dead, then his executors, administrators, or assigns are to receive it. It is true that it is said to be in lieu of the annuity of £200 thereinbefore directed to be paid to

him, which annuity is to cease, and be no longer payable, upon the payment of the said sum of £20,000, which means that if the money is paid to him during his lifetime, the annuity is to cease; but it cannot mean that though it is to be paid to him, if alive, or, if he is dead, to his executors, administrators, and assigns, yet that, if he should pre-decease his daughter, the legacy should not be payable at all. In the ordinary course of events, he would naturally die before his daughter; and therefore the testatrix, in giving this legacy, directed it to be paid to him, "his executors, administrators, and assigns," meaning that he should be able to dispose of it as he should think fit. [His Lordship then stated the residuary gift.]

I accede to the argument which was urged before me with respect to this. What is the residue which is given? It is the residue after payment of the £20,000. It does not mean that the husband is only to receive the £20,000 in case he survives his daughter. It is expressly given to him, "his executors, administrators, and assigns"; and the residue is solely given subject to the payment of that legacy. Therefore I am of opinion that this legacy is payable out of all the general estate of the testatrix, and that the legacy was meant to be a primary charge on the estates then remaining unsold, namely, the *Over* estate and the *Lyme Regis* estate, in case the rest of the estates should be insufficient.

I forbear to notice any of the other arguments; I do not place much weight upon them. The trust, in the first instance, is to pay all the legacies thereinafter given; and this being, in my opinion, a legacy thereinafter given, overrides the fact of its being a charge upon particular property; and the residue, in my opinion, is given subject to that legacy.

I have to thank Mr. *Turner* for giving me a note of the judgment of the Lords Justices on the appeal in *Fream* v. *Dowling*, which shews very clearly that their Lordships proceeded on the ground of the residue being given, and not on the ground that they differed from me on that part of the case on which I gave my judgment, as reported by Mr. *Beavan* (1).

(1) 20 Beav. 624.

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I am, therefore, of opinion that I must treat this legacy as a demonstrative legacy, and order it to be paid out of the general estate of the testatrix.

With regard to the residuary gift, I am of opinion that the issue of deceased children of *James Grant* are entitled to take as tenants in common.

Solicitors: Messrs. *Ellis & Ellis;* Messrs. *Kingsford & Dorman.*

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Will—Precatory Trust.

Bequest "of all my property to my husband, hoping he will leave it after his death to my son, if he is worthy of it," accompanied by the following explanation: "My reason for leaving all I have to dispose of to my husband, and in his entire power, is, that my son is already certain of a fortune, and that I cannot now feel any certainty what sort of character he may become. I therefore leave it to my husband, in whose honour, justice, and parental affection I have the fullest confidence. If my son dies before my husband, though I leave all without reservation to my dear husband to dispose of as he thinks fit, yet should my son leave any children, I do not doubt it will go to them from him, knowing his steady principles, and clear judgment of right and wrong, and his sense of justice:"—

Held, not to create a trust.

JANE WATTS, having a testamentary power, by her will, dated the 25th of July, 1826, made the following disposition:—

"I, *Jane Watts*, give and bequeath all property belonging to me at the date of this writing, over which I have any power, and all that may accrue to me after this time, to my dearly beloved husband, Admiral *Watts*, hoping that he will leave it after his death to my son, *W. C. Watts*, if he is worthy of it, with certain conditions hereunto annexed, viz." Then followed directions as to certain pictures and jewels, and a gift of pecuniary legacies. The testatrix then, as to her watch, the gift of her dear father, left it to her dear son, to be given to him when he was old enough to take care of it; and in case of his death before that time to Mrs. *Henderson*, for her daughter *Georgiana*, as the niece and god-daughter of her dear husband; all the trinkets that remained after what she had elsewhere named to be kept for her son's wife, if he should die without marrying to be at the disposal of her husband. The testatrix added, "I fear I have not made myself very clear, but I am sure my husband will fulfil what I have named."

Along with the above testamentary disposition the testatrix executed a supplementary paper as follows:—

"My reason for leaving all I have to dispose of to my husband, and in his entire power, is, that my son is already certain of a

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handsome fortune independent of his father, and that I cannot now feel any certainty what sort of character he may become. I therefore leave it to my dear husband, in whose honour, justice, and parental affection I have the fullest confidence. I perceive I have made one great omission, viz. that if my son dies before my husband, though I leave all my property, subject to the deduction above-named, without reservation, to my dear husband to dispose of as he thinks fit, yet should my son leave any children I do not doubt it will go to them from him, knowing his steady principles, and clear judgment of right and wrong, and his sense of justice."

The testatrix died in July, 1826, leaving only one child, her son *W. C. Watts*, and her will, together with the supplementary paper, and certain codicils not material to be stated, were proved by Admiral *Watts*, who entered into the possession of her separate estate. He subsequently married a second wife, by whom he had several children. By his will, dated the 21st of September, 1854, after making provision for his wife, and reciting that under the will of her brother certain property devolved upon his, Admiral *Watts's*, first wife, he proceeded thus: "Whose universal legatee I am, when should such bequest revert to me as heir to my said wife *Jane*, I leave the interest arising from it to my executors in trust, to be paid to my wife *Elizabeth* during the minority of any of her children, when it should revert to my eldest son *William Charles*, together with such further assets as I may see fit to leave him by codicil or otherwise; but as it is expressly provided by his mother that this property shall revert to him upon condition that he is thought worthy of it, I leave a discretionary power to my wife to retain the use of it during her life, and even to make a destination of one-half of it to her own children should his conduct be thought disreputable, which I trust it never will be. Should my son *W. C.* leave lawful issue, the entire amount shall revert to such issue. If he dies in the meantime childless, or unmarried, the said bequest shall be divided in equal portions among the children of my present marriage, subject to such abatement as to her appears expedient. Should my son *W. C.* become my only surviving child, my other children leaving no lawful issue, I leave him all my property, except the sum of £1000 to my sister."

Admiral *Watts* died on the 2nd of January, 1860.

The son, *W. C. Watts*, having, as the bill alleged, always conducted himself in an honourable manner, died on the 3rd of September, 1861.

His executors filed this bill, claiming the property bequeathed by *Jane Watts* to Admiral *Watts*, as impressed with a trust in favour of her son, *W. C. Watts*.

Mr. *Greene*, Q.C., and Mr. *Eaton*, for the Plaintiff:—

It is well settled that the expression of a wish in connection with a gift, that a particular application be made of the property, will, unless a contrary intention appear on the will, create a trust: *Malim* v. *Keighley* (1); *Knight* v. *Boughton* (2).

The rule was laid down by Lord *Truro* in *Briggs* v. *Penny* (3), that where such language is used it will be deemed to import a trust upon these conditions: first, that option is excluded; secondly, that the subject be certain; and thirdly, that the object be not too indefinite. Applying that rule to this case, the gift clearly amounts to a trust. There is no option in the event that has happened. The option was to be exercised in the event of the son turning out badly, not otherwise. The subject is certain, her fortune, the object equally so, her only son.

On these authorities the Plaintiff is entitled to the property.

Mr. *J. Hinde Palmer*, Q.C., and Mr. *Cecil Russell*, for the Defendants:—

Whatever force may be attributed to the words of confidence and trust is removed by the contrary intention apparent in the will. In *Meredith* v. *Heneage* (4), the language of the will was nearly the same as in the present case. The testator after entreating his wife to settle part of his estate in a particular manner, devised to her all his estate "unfettered and unlimited, in full confidence, and with the firmest persuasion" that she should devise the whole to one of testator's heirs, but it was held there was no trust. So in *Sale* v. *Moore* (5), though the testator "recommended,"

(1) 2 Ves. 333.
(2) 11 Cl. & F. 513.
(3) 3 Mac. & G. 546.
(4) 1 Sim. 542; S. C. 10 Price, 306.
(5) 1 Sim. 534.

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and "did not doubt," that the object of the gift would consider his near relations, it was held there was no trust. In *Hoy* v. *Master* (1), where the testator gave part of his property at the sole and entire disposal of his wife, trusting her affection for their daughter would induce the widow to make her her principal heir, it was held there was no trust. The words in this will were "leave," but in *Lechmere* v. *Lavie* (2), the marginal note was, that "words of expectation in a will, not amounting to recommendation, will not create a trust." The true criterion is the intention of the testator; where it is to be collected from the will that the testator did not intend the words to be imperative there is no trust: *Knight* v. *Knight* (3).

In *Shepherd* v. *Nottidge* (4), where the testatrix bequeathed personal estate to her executors in confidence that they would distribute them as she by memorandum would direct, but by the codicil she added, "these wishes written by myself, and only concern the interest of my executors, will, I feel sure, be quite sufficient for them to fulfil all herein named," it was held that on the will there would have been a trust, but that it was explained by the codicil, and that the executors took beneficially.

On these grounds it is submitted that the property passes under Admiral *Watts's* will.

Mr. *Greene*, in reply:—

The word "leave" or "devise," makes no difference, and occurred in *Wright* v. *Atkyns* (5), where it was held that the words of the will created a trust. In *Webb* v. *Wools* (6), and in *Palmer* v. *Simmonds* (7), no question was raised as to the words "leave and dispose of," which, it was not denied, might create a trust, though the Court decided on the uncertainty of the subject matter.

In *Harland* v. *Trigg* (8), it was laid down that "gentle words would do" if the object were distinct. In *Paul* v. *Compton* (9), Lord *Eldon* says, "whether the terms are those of recommendation, or precatory, or expressing hope, or that the testator has no doubt,

(1) 6 Sim. 568.
(2) 2 My. & K. 197.
(3) 3 Beav. 148; S. C. on app. 11 Cl. & F. 513.
(4) 2 J. & H. 766.
(5) Coop. G. 111.
(6) 2 Sim. (N. S.) 267.
(7) 2 Drew. 221.
(8) 1 Bro. C. C. 142.
(9) 8 Ves. 375—380.

if the objects and subjects are certain the words are considered imperative." In *Parsons* v. *Baker* (1), the words were "not doubting," but they were held sufficient. In one of the latest cases on this subject, *Shovelton* v. *Shovelton* (2), where a testator gave his residue to his wife, for her own absolute use and benefit, in the fullest confidence that she would dispose of the same for the benefit of her children, according to the best exercise of her judgment, and as family circumstances might require at her hands, the Court held, notwithstanding the gift to her absolute use and benefit, that she took only an estate for life with a precatory trust in remainder to her children.

On these grounds it is submitted that the Plaintiffs are entitled.

SIR JOHN STUART, V.C.:—

None of the cases cited can govern this case.

It is the well settled doctrine of this Court, that a testamentary gift, accompanied by words of entreaty, or recommendation, or expressing a wish, or confidence, will be construed as creating an absolute trust which the object of the gift will not be permitted to defeat. But it cannot be said that all words of the same character are of equal force and cogency. The word "confidence" was the old name for trust, and may now, by virtue of the context, be of the same efficacy as the word "trust." Even words of recommendation, or request, or of hope, which are hardly so strong, may be sufficient to create a trust. The distinction between these words is small, but there is generally something to be found in the context to indicate the intention of the gift.

In some of the cases there is an uncertainty as to the property given, in others, as in *Meredith* v. *Heneage* (3), uncertainty as to the person, which was the view Lord *Eldon* took of that case. The Court ought to look, not only at the particular passage, but at other expressions in the will explanatory of the degree of interest, or power, or control given to the person who is the object of the gift. None of the authorities appear to me to be inconsistent with Lord *Alvanley's* view in *Malim* v. *Keighley* (4), where he says the test is, "can the object defeat the gift?"

(1) 18 Ves. 476.
(2) 32 Beav. 143.
(3) 10 Price, 306.
(4) 2 Ves. 333.

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So in *Meredith* v. *Heneage* (1), Lord *Redesdale*, as well as Lord *Eldon*, relied much on the words that the gift was "unfettered and unlimited." Where that is the clear meaning of the words, all notion of an absolute trust is excluded.

In the present case the words of confidence are weaker than in most of the cases, while the expressions giving control to the object of the gift are extremely strong, so strong that, in my opinion, they bring this case within the observation of Lord *Alvanley*, that the subject of the gift was placed so completely in the power of the object of the gift, as that the testator left to him the option to defeat the wish or hope expressed. This, therefore, is a case in which the words expressive of hope are so qualified and overridden by the words which say that the testatrix leaves the property in her husband's "entire power," that it is impossible to hold that any valid trust is created, and there must be a declaration accordingly.

Solicitors for the Plaintiff: Messrs. *Merriman & Pike.*
Solicitors for the Defendants: Messrs. *Edmands & Mayhew.*

V.-C. S. 1867 *June* 1.

CORSELLIS *v.* PATMAN.

Order for Sale at Request of Second Mortgagee—15 & 16 Vict. c. 86, s. 48—Deposit to indemnify First Mortgagee against Costs.

The money paid into Court by a second mortgagee in order to obtain an order for sale under the Act 15 & 16 Vict. c. 86, s. 48, held to be applicable to indemnify the first mortgagee for his costs in an abortive attempt to sell.

A PETITION by the Plaintiff, who, as first mortgagee, filed a bill against *Henry Patman*, the second mortgagee, and *C. Patman*, the legal personal representative of, and devisee and legatee under the will of the mortgagor, for payment of his mortgage debt, and in default for foreclosure. By the decree made in November, 1864, the usual accounts were ordered, and also that upon the Defendant *Henry Patman* paying £100 into Court to the credit of the cause, "The Account of *Henry Patman's* Deposit," within one week after

(1) 10 Price, 306.

the date of the Chief Clerk's certificate, to be dealt with as the Court should direct, the mortgaged property should be sold, and the proceeds paid into Court and applied in payment of what should be found due to the Plaintiff; but in case the £100 should not be paid into Court, or in case such payment should be made but the property should not be sold within four months from the date of the certificate, then it was ordered that there should be redemption by, or foreclosure against, both Defendants.

The sale was directed at the sole and especial request of the Defendant *Henry Patman*. The sum certified to be due to the Plaintiff was £7596 11*s*. 2*d*. The Defendant *H. Patman* having paid the £100 into Court, the property was put up for sale in five lots, but Lot 2 only was sold, and that realized only £2100. In April, 1866, the proceeds of sale in Court were ordered to be paid to the Plaintiff, and also that the remainder of the property should be sold within four months from that date; that the Defendant *H. Patman* should have the conduct of such sale, and that there should be redemption by, or foreclosure against, both Defendants.

In the attempted sale under the decree made in November, 1864, the Plaintiff incurred costs amounting to £189 13*s*. 4*d*.

The Defendant *H. Patman* declined the conduct of the decree for sale of April, 1866. Default having been made in the payment of the balance (£5594 16*s*.) certified to be due by both the Defendants, the Plaintiff obtained orders for absolute foreclosure against both of them.

The Plaintiff, by his Petition, alleged that the residue of the property was less in value than the amount due to him; that he was a considerable loser by the attempted sale under the decree of November, 1864, and prayed that the £100 in Court might be paid to him.

Mr. *Greene*, Q.C., and Mr. *Renshaw*, for the Petitioner:—

The sale was ordered for the purpose of gratifying the desire of the Defendant *H. Patman*, but he was ordered, under the 15 & 16 Vict. c. 86, s. 48, to pay a sum into Court to reimburse the Plaintiff the costs he might have to pay in his attempt to sell. The attempt having proved abortive, and the Plaintiff having been put to considerable expenses, he was entitled to the fund in

V.-C. S. 1867 CORSELLIS v. PATMAN.

Court. [*Bellamy* v. *Cockle* (1), and *Whitfield* v. *Roberts* (2), were cited.]

Mr. *Kay*, Q.C., for the Defendant *H. Patman*:—

If all the property had been sold and had realized the reserved prices, there would have been enough money to pay off the first mortgagee and a surplus for the second, who, as there has been a foreclosure, has lost the whole of his mortgage debt. The terms imposed by the Court under the Act 15 & 16 Vict. c. 86, s. 48, have been fully complied with. It was not the language nor intention of the Act that the deposit should be paid to the first mortgagee, but that it should be made in order that the terms imposed should be complied with. The expenses of the attempt to sell ought to come out of the money produced by the sale of Lot 2.

No one appeared for the Defendant *C. Patman.*

SIR JOHN STUART, V.C.:—

If the second mortgagee had not asked for an order for sale, there would have been a decree for foreclosure. The £100 was paid into Court to indemnify the first mortgagee, who did not want a sale, against the costs he might incur. It has been shewn that the costs of the attempt to sell are much larger than the sum deposited, therefore he is entitled to the £100.

Solicitors for the Petitioner: Messrs. *Satchell & Chapple.*
Solicitors for *H. Patman:* Messrs. *W. Braikenridge & Sons.*

V.-C. S. 1867 *Feb.* 21.

CLAYTON *v.* RENTON.

County Court Equitable Jurisdiction—28 & 29 *Vict. c.* 99, *s.* 1—*Constructive Trusts.*

Constructive trusts are within the jurisdiction of County Courts under 28 & 29 Vict. c. 99, s. 1.

Post. 252

THIS was an appeal from the County Court at *Huddersfield.* *Joshua Berry*, by his will, dated the 1st of November, 1825,

(1) 18 Jur. 465. (2) 5 Jur. (N.S.) 113.

directed that his trustees, immediately after his daughter *Caroline* should attain twenty-one, should permit and suffer her to receive the rents and profits of all those his four cottages at *Deighton* (she paying the chief and other rents), and from and after her decease, he gave and bequeathed all his right, title, estate, and tenant-right in the same unto all and every the children of his daughter as should be living at her decease.

The cottages had been erected by the testator or his predecessors upon the *Thornhill* estate without a lease, in the expectation that they would not be disturbed in their possession.

The testator died in 1829; his daughter *Caroline* attained twenty-one in 1829, and married *Joseph Lunn*, and received the rents and profits. In 1841 *Caroline Lunn* and her husband charged the cottages in favour of *Henry Heron*, with the repayment of £120 and interest, and the name of *Henry Heron*, as joint tenant with *Joseph Lunn*, was entered in the books of the estate. In 1845, the interest being in arrear, *Heron* took possession of the cottages, and continued in receipt of the rents and profits until his death in 1848. By his will he appointed *James* and *Charles Heron* his executors.

On the 30th of June, 1852, the *Thornhill Estate Act* passed, which authorized the tenant in tail to grant building and other leases. The Act recited that persons had built on the estate at their own expense, and that the number of such persons was nearly three hundred.

The 17th section enacted that it should be lawful for the persons thereby authorized to grant, with the consent of the building trustees, "to any person or persons who might prior to the Act have built thereon at their own expense, or to such other person or persons as the building lease trustees should, in their uncontrolled judgment and entire discretion, consider fairly entitled to any claim, allowance, consideration, or advantage, in respect of buildings made upon the premises comprised in the 4th schedule, or any of them, whether such buildings were made by or at the expense of such persons or not, a lease or leases of the premises included in their present holdings for any term not exceeding ninety-nine years."

V.-C. S. 1867 CLAYTON v. RENTON.

The 18th section enacted that nothing in the Act contained should create any trust in relation to such leases.

The 4th schedule contained an entry as to the cottages devised by the testator, with the name of *Joseph Lunn*.

In 1855 *James* and *Charles Heron* obtained from the proper person under the Act, upon payment of a fine of £22 1*s*., a lease of the cottages for ninety-nine years, at a rent of £3 3*s*. per annum.

Caroline Lunn died in 1861, leaving her husband and eight children her surviving.

Charles Heron survived his co-executor, and the Defendants *Renton* and *Sugden* were his legal personal representatives.

The Plaintiffs, children of *Caroline Lunn*, applied for an account of the rents and profits, and the Defendants having disputed their title, on the 7th of February, 1866, they filed their plaint in the *Huddersfield* County Court. The plaint asked for an account, and secondly, that the Defendants might be declared trustees of the property for the Plaintiff. The Defendants filed a statement, in which they submitted, first, that as the object of the suit was to declare, and not to execute, a trust, the County Court had no jurisdiction; secondly, that the Plaintiffs had no title in the lease; thirdly, the *Statute of Limitations;* and fourthly, that under any circumstances Plaintiffs were bound to repay to Defendants the fine paid for the lease.

On the 28th of May, 1866, the plaint came on to be heard, when the Court declared the Defendants trustees of the cottages and of the lease for the Plaintiffs and other children of *Caroline Lunn* (according to the trusts of the will), subject to a repayment of a portion of the fine paid for the said lease and the costs of it, and of moneys laid out for ground rent, repairs, insurance, and other necessary outgoings, with interest, and decreed, on payment thereof, the Defendants to assign the premises and deliver up the lease. The decree also directed the necessary inquiries and accounts, and that the suit should be adjourned.

Against this decree the Defendants now appealed.

Mr. *J. Napier Higgins*, for the Defendants:—

The County Court has no equitable jurisdiction except under

the statute. But the Act enacts that the County Courts shall have jurisdiction in the execution of trusts where the subject matter is of less value than £500. It cannot reasonably be contended that the execution of a trust is identical with the declaration of a trust. In the former case the function of the Court is to give effect to rights in existence antecedently, but in declaring a trust the Court creates the right, and not merely gives effect to it. Therefore a constructive trust is not within the scope of the statute. In fact, a constructive trust, which is a peculiar jurisdiction of the Court of Chancery, has little in common with the trusts administered or declared in these Courts.

He also contended that the *Thornhill Estate Act* made the trustees sole judges, and, in any case, that the moneys paid by the Defendants for repairs, insurance, and other outgoings, ought to be secured to them.

Mr. *Pemberton*, for the Plaintiffs, was not called on.

SIR JOHN STUART, V.C. :—

The only question seriously raised in this case is the jurisdiction of the County Court.

The language of the statute is general, and by the 2nd clause of the first section gives jurisdiction in all cases of trusts, but however peculiar the jurisdiction exercised by this Court in constructive trusts, such a trust is as much a trust as any other. On what principle can this Court hold that, when the statute declares that the County Courts shall have jurisdiction in all cases of trust, that they have no jurisdiction in one description of trusts? The decision of the County Court judge appears to be right on every point raised before him, and the appeal must be dismissed, with costs.

Solicitors for the Plaintiffs: Messrs. *Edwards, Layton, & Jaques*, agents for *Clough*.

Solicitors for the Defendants: Messrs. *Parker, Rooke, & Parkers*.

V.-C. W.

1867

May 11;
June 1.

WILKINSON *v.* GIBSON.

Husband and Wife—Wife's Reversionary Interest—Dissolution of Marriage—Subsequent Death of Tenant for Life—Survivorship of Divorced Husband.

By a decree of the Court of Divorce, a marriage between a husband and wife was declared to be dissolved. At the date of the decree the wife was entitled to a reversionary interest in a sum of stock which was not settled before her marriage, and had been the subject of a post-nuptial settlement. After the decree, the fund fell into possession, and the divorced wife took steps to realize the fund, but before it was recovered she died:—

Held, that the same consequences as to property must follow the declaration of dissolution by the Divorce Court, as if the marriage contract had been annihilated and the marriage tie broken on that date; that those rights of the divorced husband which depended upon the contract, ceased at the same date; and that the executors of the divorced wife were entitled to the fund.

ON the 24th of December, 1842, *Elizabeth Douglas Gibson* was married to *Henry William Waddell*. At the time of her marriage she was entitled, under the will of *Joseph Holden*, who died on the 15th of September, 1820, and a family settlement dated the 9th of February, 1821, to a share in certain real and personal estate, in reversion which ultimately became expectant on the death of her father, *John Holmes Gibson*. No settlement was made prior to the marriage of Mr. and Mrs. *Waddell*, but by an indenture of settlement dated the 27th of September, 1844, and made between Mr. and Mrs. *Waddell* of the first part, and certain trustees of the second part, "All that the part or share, present or future, vested or contingent, of the said *Elizabeth Douglas Waddell*, or of the said *Henry William Waddell* in her right, of and in the hereinbefore mentioned stocks, and the dividends, interest, and income thereof respectively, and all other the premises derivable or to be derived under and by virtue of the hereinbefore recited indenture of settlement or will respectively," were assigned by *H. W. Waddell* and *Elizabeth* his wife to the trustees upon trust, during the joint lives of *H. W. Waddell* and *Elizabeth* his wife, for her separate use and benefit; and after her death for the benefit of *H. W. Waddell* if he should be then living, and his assigns during his life; and after the decease of the survivor of them upon trust for their children;

and in default of children, upon trust to pay, assign, and transfer the said trust moneys and premises unto the survivor of *H. W. Waddell* and *Elizabeth* his wife, and his, her, or their executors, administrators, and assigns.

The Act to amend the Law relating to Divorce (20 & 21 Vict. c. 85), passed on the 28th of August, 1857, and by a decree of the Divorce Court, dated the 4th of November, 1862, the marriage between *Henry William Waddell* and *Elizabeth Douglas Gibson* was dissolved. There never was any issue of the marriage.

On the 11th of April, 1865, *John Holmes Gibson*, the tenant for life, died, and thereupon the shares fell into possession; and on the 14th of July following this bill was filed by the owners of several of the shares, for the execution of the trusts of the will of *Holden*, and settlement of 1821. In this suit *Elizabeth Douglas Gibson* (late *Waddell*) was a co-Plaintiff.

On the 23rd of September, 1865, *Elizabeth Douglas Gibson* died, having by will appointed executors, by whom her will was duly proved.

By a deed dated the 19th of October, 1865, *H. W. Waddell* assigned for valuable consideration all his share and interest in the above-mentioned trust funds and premises to *John Marshall Gisby*.

By an order in the suit, dated the 26th of February, 1867, a share in the trust funds was directed to be paid and carried over to an account, intituled "The Account of the late Plaintiff *Elizabeth Douglas Gibson*, her Settlement Trustees, or Executors."

A Petition in the cause (answered on the 12th of March last) was presented by *John Marshall Gisby* and *Henry William Waddell*, praying that it might be declared that the Petitioner, *J. M. Gisby*, was absolutely entitled to all and singular the share of the late *Elizabeth D. Gibson*, or of the Petitioner, *H. W. Waddell*, in her right, in the trusts, funds, and premises, and for payment and transfer accordingly. The Respondents to this Petition were the executors of *Elizabeth D. Gibson*, and the trustees of the post-nuptial settlement.

A cross Petition (answered on the 18th of March) was also presented by the executors of *Elizabeth D. Gibson*, praying that the cash and stock so ordered to be paid and carried over to the above account might (when so paid and carried over) be paid and trans-

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ferred to the Petitioners as such executors. The Respondents to this Petition were the trustees of the post-nuptial settlement, *H. W. Waddell* and *J. M. Gisby*.

The two Petitions now came on together.

The *Attorney-General* (Sir *John Rolt*), Mr. *G. M. Giffard*, Q.C., and Mr. *Humphry*, for the Petitioners in the first Petition:—

The marital right of the husband to his wife's *choses en action* is qualified by one condition only—that he reduces them into possession during the joint lives: *Purdew* v. *Jackson* (1); and if he survives his wife, they are his by survivorship. At any time during his wife's life he can sue for them in her name, and after her death he is entitled to them, whether he be her administrator or not. His right is good against the whole world except the surviving wife.

Then the question is, whether the operation of the *Divorce Act*, which empowers the Court to declare a marriage to be dissolved, and which prevents a husband, after such a decree, from suing in his late wife's name, and prevents him from taking out administration to her estate, really destroys the husband's marital right. We say that unless the statute has, for the purpose of ascertaining the mutual rights of parties in property, declared that a decree of dissolution shall be equivalent to death, no such result can follow. The husband's right remains.

It has been supposed that the right of a surviving husband to his late wife's *choses en action*, flows from, and depends upon, his right to administer. We say they belong to him *jure mariti*, and are independent of the right to administer, as is shewn by the authorities cited in the note to *Watt* v. *Watt* (2), which establish that if the husband should die before he can take out administration, and the next of kin of the wife should administer, they are only trustees for the husband and his representatives. *Betts* v. *Kimpton* (3) is to the same effect.

Then what is the effect of these statutes? Have they anywhere declared that for this purpose a dissolution is equivalent to death? By the 57th section of the *Divorce Act* of 1857 (20 & 21 Vict.

(1) 1 Russ. 1, 24. (2) 3 Ves. 246-7, n. (3) 2 B. & A. 273.

c. 85), it is provided that after the expiring of the time for appealing against a decree of dissolution, the parties may marry again, "as if the prior marriage had been dissolved by death;" but this does not affect property. An expression of this sort fell from Lord *Romilly* in *Wells* v. *Malbon* (1); but in that case both the husband and wife were living.

It is remarkable that none of the Divorce Acts touch this particular question. Sect. 25 of the Act of 1857, and sect. 7 of the Act of 1858 (21 & 22 Vict. c. 108), deal with the property of a wife after an order of protection, or a judicial separation; but not after a decree of dissolution. So by sect. 5 of the *Divorce Court Act* of 1859 (22 & 23 Vict. c. 61), the Court of Divorce is empowered, after a decree of dissolution of marriage, to inquire into the existence of ante-nuptial and post-nuptial settlements made on the parties, and to make such orders with reference to the application of the property for the benefit of the children, or of their respective parents, as the Court shall think fit. But that has no application here.

If it be said that the provisions of the Divorce Acts of 1857 and 1858, with regard to a wife's property after a judicial separation, must, by implication, be held equally to apply to the case of a dissolution of marriage, we then submit to the Court this consideration. By the law of *England* the contract of marriage is indissoluble. The law speaks, indeed, of a divorce *à vinculo*, but that is only on the theory that the marriage was voidable *ab initio*. Sir *W. Scott*, in *Proctor* v. *Proctor* (2), speaks of the legal nature of the contract of marriage, as founded on the ancient canon law, and to be "indissoluble by human power for any cause whatever." Then he goes on to say (3), that a great portion of the canon law has been swept away by the Legislature. "But," he adds, "the doctrine of indissolubility remains in full force. The very practice of the Legislature in granting, by special Acts, particular divorces in particular cases, affirms the indissolubility as existing in the general law, and to be maintained by the Courts in their dispensations of justice." And the provisions of the old Divorce Acts in a great measure confirm this view. The Legislature, in passing those Acts, thought it necessary to add a clause empower-

(1) 31 Beav. 48. (2) 2 Hagg. Cons. 292, 296. (3) Page 301.

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ing the innocent party to marry again, and expressly disposing of the property of the wife; apparently because such declarations and provisoes were necessary, and because the declaration of dissolution was powerless of itself to effect these consequences. If that be so, it at least seems to follow that where the Divorce Acts have not expressly defined the consequences which are to flow from a given *status*, namely, that of a statutory dissolution, the old law remains. If so, the husband's right has not been displaced by the statutes of divorce.

As to the settlement, it cannot be disputed that it would have been a nullity against the surviving wife. But she is not the survivor, and it is to be remarked that after the decree of dissolution she never repudiated it. There is nothing in the Divorce Acts to say that a decree of dissolution is to vitiate everything that was done during the coverture.

Mr. *W. W. Mackeson*, for the trustees of the post-nuptial settlement.

Mr. *Kay*, Q.C., and Mr. *C. C. Barber*, for the executors of *Elizabeth Gibson*, were not heard.

SIR W. PAGE WOOD, V.C.:—

I do not see how I can entertain any doubt in this case, unless I am prepared to say that the *Divorce Act* is an absolute failure, and that the section which directs the Court of Divorce to pronounce a decree declaring a marriage to be dissolved, is to be followed by none of the consequences that would ordinarily flow from such a declaration, except, and to the extent only, of such consequences as are pointed out by the Act itself.

Anterior to the Act, it may be conceded that the law of *England* would not recognise the possibility of the annihilation of the contract of marriage, or of any dissolution of a marriage; for, whenever such expressions as "divorce *à vinculo*" occur, they always refer to cases, such as those of impotence, where there never existed a *vinculum*, and the so-called marriage was never a marriage at all. The only mode, before the Act, of effecting a dissolution of marriage was by a private Act of Parliament; and

no doubt the language commonly employed in these Acts is the origin of the phrase, "a dissolution of marriage."

It is, no doubt, true that these Acts, after declaring a marriage dissolved, went on to declare what should be done with reference to the property in each case; and very often, *ex abundanti cautelâ*, clauses were inserted, varying in different instances, which provided for the disposal of future-acquired property; although, as the marriage was dissolved, this could not, I apprehend, be a matter requiring consideration, unless, indeed, on the very high theory advanced by Mr. *Humphry*, that not even an Act of Parliament can effect the dissolution of a marriage. According to his view, the statute simply declares a state of things, from which no consequences can flow except those that are defined.

But, I apprehend, the consequences that follow from such a declaration as this, whatever be the view of the private Acts, must be the same as would follow from an annihilation of the marriage at that moment. Nothing short of that appears to me to be a reasonable construction, either of the private Acts or of the public *Divorce Act*. I read all such Acts as signifying this: that from the moment this declaration is made the marriage is entirely destroyed, and the *vinculum* no longer exists. It is true that the statute which enacts that the Judge shall pronounce a decree declaring the marriage to be dissolved, does not, as we should have expected, go on to enact, "and the marriage shall thereupon be dissolved accordingly." But it must be taken to involve that consequence, and the true meaning of the enactment is, that, whereas, hitherto, Parliament has declared marriages to be dissolved, Parliament now hands over that authority to this particular tribunal, and enables this tribunal to make a declaration which Parliament alone could make with effect before. Therefore, when the Legislature has said that a marriage may be declared to be dissolved, I must consider that the marriage is dissolved from the moment such a declaration is made. Mr. *Humphry* pushed the argument to this extent, that if the parties were to cohabit again without any re-marriage, the children would be legitimate, and all the future property of the divorced woman would come to the husband; and I suppose the latter would be contended for, even in the event of her marrying again. But it appears to me that the

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true purport of the Act is to be gathered from the history of the law; namely, that formerly there could be no dissolution by any means known to the law of *England;* for when recourse is had to the authority of the Legislature, and the sovereign power of the country is invoked through the medium of the Crown and both Houses of Parliament, that is an admission that there is no law existing which permits that to be done for which it is thus necessary to invoke the sovereign authority. Whatever may be the effect spiritually, on higher grounds and considerations, there can be no doubt that the sovereign power of every country has authority over everything which relates to persons and property. At length, when the applications for special Acts of Parliament became very frequent, it was thought better that the sovereign power should hand over to some definite tribunal, then for the first time established, that authority which it could exercise for itself, and delegate the power to declare the *vinculum* annihilated, and, as I must take it, with all the consequences.

My attention was called to the clause which prohibits the parties from marrying again until the expiration of a certain time. That only shews the intention of the Legislature more clearly. The power having been given to this tribunal with a right of appeal, should the appeal be successful the marriage would not be annulled, and it would be extremely inconvenient if the marriage of either party were permitted in the *interim*. But when the right of appeal is at an end, the marriage is definitely, finally, and entirely broken off, and the parties are declared at liberty to marry again.

This absurd result will also follow from the construction I am asked to put upon the Act: that there will not be the same consequences upon a dissolution of marriage as, by the 25th section, it is declared there shall be in the case of a judicial separation, when the *vinculum* is not broken. In that case the Act declares that, from the date of the sentence, and whilst the separation shall continue, the wife shall be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to, or devolve upon her. That is so declared, because otherwise her future property would not be affected by the decree, so long as she remained a wife; but when the Act says that a decree of dissolu-

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tion shall be declared, such a declaration with regard to property as the above is no longer necessary. To say that, when there is an absolute rupture of the marriage tie, the consequence that the woman is to take her property with her and be treated as a *feme sole* shall not follow, seems to me to be a preposterous and absurd construction of the Act.

As regards the particular property before me, it was the reversionary interest of a lady who made no settlement of it before her coverture, and was, of course, not in a position to do so afterwards; but after her marriage there was what purported to be a settlement of the property on herself for life, with remainder to her husband for life, remainder to the children, and, in default, to the survivor absolutely. That was a very good settlement so far as the husband was concerned; but I must treat it as an absolute nullity with regard to any matters in which the interests of the wife were concerned. This Court will not allow a married woman to bind her reversionary interests except in cases provided for by the Act of Parliament; and I must, therefore, lay the settlement out of the case, and consider the question as one of the reversionary interest of a married woman which was not reduced into possession, because the tenant for life lived to a date subsequent to the divorce.

7 H. L. 859

Then the argument is, that a husband by his marriage acquires an immediate right to all the wife's *choses en action*, though not reduced into possession in her lifetime, subject only to this—that he survives his wife. I think that is a fallacious way of putting it, and that we must look a little more closely to see what is the correct view of the subject. It is true that as the old law stood there was no mode of dissolving the union, except by the death of one or other of the parties to the original contract. But how does the husband acquire this property? By virtue of the contract—*jure mariti*—he acquires a right to all the property that may fall in, or that may be got in by him, during the coverture. That, I apprehend, is the true state of the law. It might be said "during his life," when there was no difference in the period of the joint lives and the period of the coverture. The meaning was—that class of property is the husband's provided he makes it his during the coverture, or survive his wife. But if a reversionary interest of

V.-C. W. 1867 WILKINSON v. GIBSON.

the wife falls in during the coverture, and her husband does not recover it, the wife is entitled to it. That is the true rule. Even when the expression "surviving the wife" occurred in the old books, it implied that the person whom the husband survived was his wife, and not a person who was no longer his wife. How could the husband sue for this after the divorce? In ordinary cases he must join his wife's name with his in the suit. But here he continued no longer in a position to sue in the right of this lady as his wife. He could not make himself master of the fund whilst the tenant for life was living, and before the tenant for life died the *vinculum* was broken. The whole principle originally was that the husband could sue by virtue of the contract. If he could recover it during the contract (or, according to the old law, during the joint lives, which was then the same thing), he was entitled to it; if he could not recover it during the continuance of the contract it became his wife's. Here the contract has been determined by a mode unknown to the old law, namely, by a decree of dissolution; and as the husband was unable during the existence of the contract to reduce this chattel into possession, I must hold that the property remained the property of the wife.

There will be no order on the first Petition, and on the second Petition an order as prayed; the Respondents to the first Petition, and all parties to the second Petition, to have their costs out of the £100 in Court, and if that be not sufficient, out of the fund. The settlement trustees, having no fund, must take costs only as between party and party.

Solicitor for the Petitioner in the first Petition: Mr. *G. Beetham Batchelor.*

Solicitors for the Petitioners in the second Petition: Messrs. *Pilgrim & Phillips.*

Solicitors for the Trustees: Messrs. *Surr & Gribble.*

In re NEWTON'S TRUSTS.

V.-C. W.
1867
May 11.

Will—Construction—Gift of Personalty to the Heirs and Assigns of a deceased Person.

Testator, after giving several sevenths of his personal estate to his living brothers and sisters "and their heirs and assigns" respectively, proceeded to give another seventh as follows:—"To the heirs and assigns for ever of my late sister *D.*, now deceased":—

Held, that the persons entitled to this last-mentioned seventh were the next of kin of *D.* at her death, according to the Statutes of Distribution.

8 Eq 144-5
7 L 380
15 Eq 111.

THOMAS NEWTON, by his will, dated the 23rd of February, 1851, gave and bequeathed "unto his brother, *Jonathan Newton*, his heirs and assigns for ever," one-seventh part of his personal estate. He also bequeathed other sevenths in similar terms to four others of his brothers and sisters who were living at the date of his will. He then proceeded as follows:—"I also give and bequeath to the heirs and assigns for ever of my late sister, *Deborah Best*, now deceased, one-seventh part of my personal estate;" and then gave the remaining seventh in similar terms to the heirs and assigns of another sister, who was also dead at the date of the will.

Upon the death of the testator, his executor paid one-seventh of the personal estate, representing the share of *Deborah Best*, into Court; and this Petition was now presented by the executor of the eldest son and heir-at-law of *Deborah Best* to have the investment of the sum representing this one-seventh transferred to him.

Mr. *Druce*, Q.C., and Mr. *Ferguson*, for the Petitioner:—

The rule is laid down by Lord *St. Leonards* in *De Beauvoir* v. *De Beauvoir* (1), that, where the testator has given personal estate to the heir, he will take as *persona designata*, and has been followed in *In re Rootes* (2).

But here the gift is to the heir as purchaser; so that in reality the question that was raised in *De Beauvoir* v. *De Beauvoir*, and that class of cases, does not arise.

(1) 3 H. L. C. 524, 557. (2) 1 Dr. & Sm. 228.

V.-C. W. 1867 *In re* Newton's Trusts.

[*Quested* v. *Michell* (1), in which Vice-Chancellor *Kindersley* followed *Tapner* v. *Merlott* (2), was also referred to.]

Mr. *Mounsey*, for the statutory next of kin of *Deborah Best* :—

The heir can only take as *persona designata*. But how is he designated in this will? *In re Rootes*, and other decisions in favour of the heir as *persona designata*, are confined to cases where the words are "heirs," or "right heirs," only, without "assigns," shewing that the testator had some view of benefiting a particular person or class of persons. If the testator's language shews the presence of any idea of "succession" or "descent," the claim of the heir is silenced: *Mounsey* v. *Blamire* (3); *Jarman* on Wills (4).

The argument used by Lord *St. Leonards* in *Gittings* v. *M'Dermott* (5), applies to this case, where the testator has five times used the same words, "heirs and assigns," to carry the personal estate—namely, that as the property, in the cases of the children living at the date of the will, would have gone to them absolutely, and from them to their personal representatives, it is reasonable to suppose that, when the testator spoke of the heirs and assigns of *Deborah*, he meant to benefit the same class of persons in relation to her as would have taken after the deaths of the other children, in relation to them.

This principle has been followed in this branch of the Court in *In re Porter's Trusts* (6) and *Re Gamboa's Trusts* (7).

Mr. *Bedwell*, for the personal representative of *Deborah Best* :—

In *Quested* v. *Michell* it was distinctly held that, as to the personalty, the gift was absolute.

The true construction is, that the testator meant to deal with all his brothers and sisters alike: *Low* v. *Smith* (8).

Mr. *Druce* in reply :—

It cannot be said that the testator had the same idea with regard to *Deborah* as the rest, because he knew that *Deborah* was dead.

The only force of the word "assigns" is, that the interest which

(1) 24 L. J. (Ch.) 722, 1 Jur. N.S. 418
(2) Willes, 177.
(3) 4 Russ. 384.
(4) Vol. ii. pp. 55—76.
(5) 2 My. & K. 69.
(6) 4 K. & J. 188, 4 Jur. N.S. 20
(7) Ibid. 756.
(8) 2 Jur. (N. S.) 344, 25 L.J.Ch. 5

the heir takes is an assignable interest; and the case is thus brought back to *In re Rootes* (1).

SIR W. PAGE WOOD, V.C.:—

Taking the whole of this instrument together, I must come to the conclusion that the statutory next of kin of *Deborah Best* are the persons who are intended here by the words "heirs and assigns" of the testator's deceased relative.

The scheme of the will appears to be, that the whole of the testator's personal property should be divided between the relatives he has named, and the representatives of those who were dead at the date of the will, in equal shares. [His Honour read the words and continued:—]

No doubt the tendency of recent decisions has been that "the heir" takes as a purchaser. The original sense of the word is to prevail, and the person who is heir is to take as *persona designata;* and that, notwithstanding the character of the property bequeathed. But here, the gift being to the "heirs and assigns," it is impossible for the heir to take as *persona designata.* And when it is found that in all the previous gifts the testator has used the words "heirs and assigns" unnecessarily, the conclusion is, that his notion was that this was the proper mode of limiting personal estate, so that it should go in the ordinary course of distribution by law. Then, one of his relatives being already deceased, he intended to make a *quasi*-substitutional gift to those persons who might represent in law his deceased relative, precisely as he had given one-seventh already to each living relative, "his (or her) heirs and assigns."

I think there is sufficient indication of the testator's intention, though his notion as to the proper mode of limiting personal estate was an erroneous one.

There will therefore be a declaration that, according to the true construction of the will, the persons entitled to this fund are those who were the next of kin of *Deborah Best* at her death, according to the Statutes of Distribution.

Solicitors: Messrs. *Sharp & Ullithorne;* Messrs. *Gray & Mounsey.*

(1) 1 Dr. & Sm. 228.

V.-C. W. 1867 May 2.

LONDON AND NORTH-WESTERN RAILWAY COMPANY *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Jurisdiction—Trespass—Irreparable Injury—Injunction—Demurrer.

7 Ch 708
24 Q.B.D. 3

A bill was filed to restrain a railway company from placing an obstruction, partly on a public footway and partly on land belonging to the Plaintiffs, a rival railway company, so as to block up the access to a station of the Plaintiffs, and alleged that the injury to the traffic by allowing the obstruction to remain would be irreparable, and that the act was done without any colour of title by the Defendants:—

Held, that this was one of the exceptional cases in which this Court would interfere to restrain a trespass by a stranger, and demurrer overruled.

Demurrer.

The bill, which was filed to restrain an obstruction by the Defendant company to the access to a station of the Plaintiff company at *Wigan*, contained the following statements:—

The Plaintiff and Defendant companies had for many years been, and still were, competitors for traffic between *Wigan* and *Manchester*, and their stations at *Wigan* were near to each other.

(14.) The Plaintiffs being desirous of enlarging their station, purchased of Lord *Kingsdown* a piece of ground adjoining their station on the east side, and lying between such station and a lane called *Faggy Lane*, and by an indenture dated the 31st of July, 1861, such piece of ground was duly conveyed by Lord *Kingsdown* to the Plaintiffs. The Plaintiffs thereupon enlarged their station by throwing into it the purchased land, and enclosing it by a substantial brick wall, in continuation of the boundary wall of their railway along the west side of *Faggy Lane*. In order to suit the convenience of the inhabitants of *Wigan*, by affording them access to the station from *Faggy Lane*, the Plaintiffs, about two years ago, took down part of their new boundary wall and made an opening into *Faggy Lane;* and that opening was "daily and constantly used without interruption by persons travelling by the Plaintiffs' railway, and by the Plaintiffs and their officers, servants, and workmen, as a means of access to

and from the Plaintiffs' station from and to *Faggy Lane;* and such means of access was a very great convenience to the persons using such railway, and to Plaintiffs, their officers, servants, and workmen."

On the 29th of March Defendants, without any previous notice, and without any lawful authority for so doing, erected a strong wooden fence, partly upon the land purchased by the Plaintiffs from Lord *Kingsdown* and partly upon part of *Faggy Lane*, so as completely to block up the communication between Plaintiffs' station and *Faggy Lane*, and to prevent any person from passing from *Faggy Lane* into the Plaintiffs' station. The Plaintiffs caused the fence or barrier to be removed, but, on the following day (the 30th of March), Defendants caused a much stronger fence to be erected in the same place. On the 1st of April the Plaintiffs caused this barrier to be removed, although the workmen of Defendants, fifty in number, opposed its removal with great force and violence, and a considerable disturbance took place. On the 3rd of April the Defendants commenced, and on the 4th of April completed, the erection of a very strong barrier or stockade, eight feet high, and sunk to a considerable depth, made of very thick timber, and clamped with iron, on the site of the barriers which had been removed, so as completely to obstruct the entrance and prevent all access between the station and *Faggy Lane.* The Defendants at the same time had also erected two other barriers across *Faggy Lane;* but these barriers were afterwards, on the 11th of April, removed by them, as proceedings by way of summons in respect of these obstructions had been taken against them by the local board of health for *Wigan.*

(24.) The stockade in front of the entrance to Plaintiffs' station "was so erected by Defendants without any lawful warrant or authority, for the purpose of preventing passengers from coming to or going from Plaintiffs' station by *Faggy Lane*, and to induce them to use the railway route of Defendants instead of that of Plaintiffs."

(25.) "The Defendants the company have, by their officers and servants, stated that they will keep the said entrance into Plaintiffs' station from *Faggy Lane* stopped up as aforesaid at all hazards, and that they will by force prevent the removal of such fence; and

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under the circumstances aforesaid Plaintiffs have not again attempted to remove it."

(26.) "Plaintiffs have sustained great loss and injury by the aforesaid unlawful conduct and proceedings of Defendants the *Lancashire and Yorkshire Railway Company*; but they are advised, as the fact is, that they have no adequate remedy at law against Defendants the *Lancashire and Yorkshire Railway Company*, but they are entitled to such relief in equity as is hereinafter prayed."

The bill prayed an injunction to restrain Defendants from permitting the barrier to remain unremoved; an injunction to restrain the erection of any fence whereby the traffic to or from Plaintiffs' station along *Faggy Lane*, or free and uninterrupted access to the station for Plaintiffs, their officers, clerks, servants, and workmen, or any person, might be in any manner obstructed, hindered, or impeded; and also an injunction to restrain Defendants from preventing the removal by Plaintiffs of the fence in front of the entrance to their station, or the removal of any other obstruction erected by Defendants.

The bill also prayed compensation in damages for the trespasses, obstruction, and nuisance thereinbefore complained of.

To this bill the Defendants filed a demurrer.

Sir *Roundell Palmer*, Q.C., and Mr. *Lorence Bird*, in support of the demurrer:—

The Court will not entertain a bill for the purpose of restraining a simple legal trespass by injunction; and all that is alleged by this bill is an encroachment, without colour of title, by *A.* upon *B.'s* land, which has the effect of shutting out *B.* from access to a public highway. In *Davenport* v. *Davenport* (1), which was a bill by a man out of possession, but claiming to be entitled under a settlement against the Defendant, who had been in possession of the estate for nineteen years, praying an injunction to restrain him from cutting and selling ornamental timber, Vice-Chancellor *Wigram* allowed a demurrer, deciding that where there was no equity between the parties apart from the mere question of legal right, the Court would not interfere in a case of trespass against the party in possession until the right was established at law.

(1) 7 Hare, 217.

So again in *Earl Talbot* v. *Hope Scott* (1), where your Honour observes (2): "Where there is an entire want of privity between Plaintiff and Defendant, and Defendant is simply a wrongdoer at law, this Court does not take upon itself to interpose, unless in certain very exceptional cases"—such as an invasion by a mere trespasser "by cutting down timber without a colour, or shadow, or pretence of title, and the property may be destroyed before you can arrest his proceedings at law. But even that was not recognized as a case for the interference of the Court until after a considerable struggle in the mind of Lord *Thurlow*: *Robinson* v. *Lord Byron* (3)." No doubt a certain amount of perseverance in a trespass, or a vexatious repetition of trespass after the right has been established at law, might be restrained; but, except in cases of irreparable damage, and not merely of an inconvenient and temporary interruption of a right, the Court does not interfere. Again, in *Best* v. *Drake* (4) your Honour declined to interfere for the purpose of preventing annoyance to property by a mere stranger, and in *Webster* v. *South Eastern Railway Company* (5) it was held that a railway company is not more the object of this species of injunction than anybody else, where the company is acting simply as a person asserting an adverse right.

No case of irreparable damage such as that on which the Court has acted, in the exceptional cases referred to, here arises. It is not even alleged that the obstruction will in the slightest degree interfere with Plaintiffs' carrying on trade, but only that the footway was convenient, and that, being deprived of it, they suffer loss and injury. On the statements in the bill there is complete and ample remedy at law, and there is no jurisdiction in this Court to interfere. Further than this, the Plaintiffs have taken the law into their own hands; and, lastly, there is no sufficient allegation in the bill that the Plaintiffs are owners of the land right up to and adjoining the footway.

The *Attorney-General* (Sir *John Rolt*) and Mr. *Speed*, for the Plaintiffs, in support of the bill, were not called upon.

(1) 4 K. & J. 96, 4 Jur. N. S. 1172 (3) 1 Bro. C. C. 588.
(2) Ibid. 112, 4 Jur. N. S. 1174 (4) 11 Hare, 369.
(5) 1 Sim. (N. S.) 272.

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SIR W. PAGE WOOD, V.C.:—

This demurrer must certainly be overruled. It is one of those cases of irreparable mischief occasioned by a trespasser against persons in possession which require relief in equity. *Robinson* v. *Lord Byron* (1) was just a case of the same character in one sense. In that case, the letting down the water by the miller, so as to inundate his neighbour, was an act which could not be remedied, and the evil of which would be irreparable before the right in question could be tried. What is alleged here is, that the Plaintiffs, on land of which they have had possession for nearly six years, opened, about two years ago, a foot passage into this lane, for the accommodation and at the request of persons desirous of coming that way to their railway, a convenience to those who wished to use the railway. The operation being described as simply an opening in their wall (which, they say, they completed after the purchase from Lord *Kingsdown*), I must assume that to be on the very verge or edge of the lane. Then the bill alleges that they are rivals in traffic with Defendants; that persons have daily used this footpath as passengers on their railway; and that the obstruction in question, by the Defendants, is for the express purpose of diverting that traffic and inducing persons to travel on Defendants' line of railway, whereby the Plaintiffs will be irremediably damaged. This, one can easily see, is most likely to take effect, as, if passengers are prevented from using one easy mode of access, which they were daily in the habit of using, the diversion of that traffic will arise, and it is that sort of damage which cannot be measured. There is no mode of estimating it. It is just as if a large shop in *Regent Street*, having two entrances to its place of business, constantly used, and by which the business had been largely increased (one in *Regent Street* and the other in a side street), were to find that some one had taken upon himself to close up one of those entrances. It is just one of those cases of trespass and irremediable damage which the Court does interfere to prevent. In *Hervey* v. *Smith* (2) I felt no hesitation in granting a mandatory injunction where a man had placed a tile upon his neighbour's chimney-pot. It was one of

(1) 1 Bro. C. C. 588.

(2) 1 K. & J. 389.

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those simple and summary acts which can be so immediately done, that it is not possible to prevent it while the right is being tried, and I decided that the Court would interfere to prevent such damage. In this case it is impossible to say what amount of traffic will be lost while the right is being tried. It is not in the least analogous to the cases cited, in which the Court has refused to interfere against the legal title of the person in possession, who was about to cut down trees, or exercise similar acts of ownership.

Here there is no averment on the face of the bill that the Defendants claim any right in the property. They place this obstruction partly on the Plaintiffs' property and partly on the lane. I agree that, so far as the public lane is concerned, it does not appear that there is any obstruction to those persons going along the lane, who do not want to come upon the Plaintiffs' property. But the allegation is that partly on the Plaintiffs' property, and partly on the lane, Defendants have made a wall which is an obstruction. That is a case, I think, for relief, and the demurrer must be overruled.

Solicitors: Mr. *J. Blenkinsop*; Messrs. *Clarke, Woodcock, & Ryland.*

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1867

March 2.

GRIEVE *v.* GRIEVE.

Gift to A. and B. and their Children—Rule in Wild's Case.

Devise of house to my nieces *Louisa* and *Emily*, and to their children, and if they have not any, to their brother *William* and his children; "the furniture to go with the house." Neither of the nieces had a child at the date of the will, but both had children born afterwards:—

Held, that the rule in *Wild's Case* (1) was not inflexible, and that the gift of the furniture was a sufficient reason for not vesting estates tail in the nieces; and, therefore, that the nieces took the house and furniture for their lives, with immediate remainders to the children of each coming into *esse* during the lives of the nieces.

THE question in this case was as to the construction of the following devise and bequest contained in the will of *Rachel M. A. Salmon*, bearing date the 20th of April, 1846:—

"To my nieces *Louisa* and *Emily* I leave my house at *Clifton* after my sister's death, and to their children, and if they have not any, to their brother *William* and his children, always burthened with £10 a year to the *Clifton* school. The furniture to go with the house, but changed as my sister may like."

The testatrix died in February, 1847.

The testatrix's niece *Louisa* had five children, the eldest born in May, 1846, between the date of the will and the death of the testatrix, the others being born afterwards. The niece *Emily* married, and had since died, having had only one child, born in 1854, after the death of the testatrix.

The testatrix's sister having died, this special case was presented to determine the rights as between the two nieces and their children.

Mr. *Charles Hall*, for the Plaintiff, the niece *Louisa*:—

The gift here being a gift to two persons and their children, and there being no children at the time of the devise, that is, at the date of the will, children must be read as a word of limitation, and the rule in *Wild's Case* (1) must be applied so as to give an

(1) 6 Rep. 16 b.

estate tail to the nieces. The word "children," then, being construed "heirs of the body," the effect will be, according to *Co. Litt.* (1), that the nieces will take joint estates for their lives, with several inheritances in tail, with cross-remainders between them in tail: *Forrest* v. *Whiteway* (2); *Ex parte Tanner* (3). In *Webb* v. *Byng* (4), Vice-Chancellor *Wood* construed a gift to one and her children as vesting an estate tail in the first taker, in a case where there was a gift of heir-looms, in order to carry out the intention of the testator, and that decision was affirmed by the House of Lords: *Byng* v. *Byng* (5).

The direction that the furniture shall go with the house does not prevent *Wild's Case* (6) applying, as, although the rule in that case is not applicable to personalty, it applies to the realty, and the personalty will follow the realty.

[He also referred to *Jarman* on Wills (7), and *Hawkins* on Wills (8).]

Mr. *Karslake*, Q.C., for the husband and only child of the niece *Emily*; and Mr. *George Williamson*, for the infant children of the Plaintiff:—

The rule in *Wild's Case* is not inflexible, and will not be applied where its effect would be, as in the present case, to defeat the intention of the testatrix, which the Court will ascertain by reference to the whole will: *Byng* v. *Byng*.

The intention of the testatrix was, that the nieces should take separate estates for life, and that the children of each should take in moieties; and by reading the word "children" as a word of purchase, this intention, both as to the house and furniture, will be carried out; while the effect of giving estates tail to the nieces would certainly, as to the furniture, defeat the intention of the testatrix: *Buffar* v. *Bradford* (9); *Broadhurst* v. *Morris* (10); *Seale* v *Barter* (11); *Oates* v. *Jackson* (12); *Jeffery* v. *Honywood* (13).

(1) Sect. 283.
(2) 3 Ex. 367.
(3) 20 Beav. 374.
(4) 2 K. & J. 669.
(5) 10 H. L. C. 171, 8 Jur. N. S. 1135.
(6) 6 Rep. 16 b.
(7) 2nd Ed. vol. ii. p. 329; 3rd Ed. vol. ii. p. 365.
(8) Page 182.
(9) 2 Atk. 220.
(10) 2 B. & Ad. 1.
(11) 2 B. & P. 485.
(12) 2 Str. 1172.
(13) 4 Madd. 398.

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Moreover, the rule in *Wild's Case* (1) does not apply to personalty, and the direction that the furniture shall go with the house prevents that rule being applied: *Audsley* v. *Horn* (2).

Mr. *Charles Hall*, in reply, referred to *Towns* v. *Wentworth* (3).

SIR R. MALINS, V.C.:—

The construction of this will involves considerable difficulty.

It has been contended that I am bound by the rule in *Wild's Case* to hold that the nieces took an estate tail, the rule being that where there is a gift to one and his children, and there are no children at the date of the will, it vests an estate tail in the parent.

On the part of the Defendants it was contended that there is enough on the face of the will to shew that the intention of the testatrix was, that the nieces should be tenants for life, with remainders to their children; and I think that is the right construction.

The rule in *Wild's Case* has always been regarded as flexible, and one which may be departed from. This was clearly stated in the case of *Byng* v. *Byng* (4), by Lord *Cranworth*, as follows:—"It must be taken as established by the rule of construction laid down in *Wild's Case*, that where there is a devise of land to a man and his children, and he has at the time of the devise no children, then *primâ facie* the word 'children' shall be taken to be a word of limitation, and the first taker shall have an estate tail; but, on the other hand, if the first taker has children at the time of the devise, then the will shall, *primâ facie*, be construed as giving a joint estate to the first taker and the children as purchasers. I have qualified the rule, as stated by Lord *Coke*, by introducing the words '*primâ facie*,' because he certainly did not mean to state the rule as one which must take effect where a contrary intention was apparent; and it is clear that, in acting on the rule in both its branches, the Courts have always considered themselves at liberty to disregard it where an adherence to it would defeat the intention of the testator, as collected from other passages in the will."

(1) 6 Rep. 16 b.
(2) 26 Beav. 195; 1 D. F. & J. 226.
(3) 11 Moo. P. C. 526.
(4) 10 H. L. C. 178.

In that case the rule was treated as flexible, for the reason that the devise was to *Mary Anne Byng* and her children. *Mary Anne Byng* had many children at the time, and, according to the rule in *Wild's Case*, she and her children must have taken as joint tenants in fee; but when the context of the whole will was looked at, it was found that the devisee was to take the name and arms of *Cranmer*, and the House of Lords arrived at the conclusion that there was sufficient to shew that *Wild's Case* (1) must not be applied, and that the intention of the testatrix would have been defeated unless an estate tail was given.

In this case the question is, whether I must apply *Wild's Case* so as to give an estate tail where such a construction would defeat the intention of the testatrix. In *Byng* v. *Byng* (2), the house and the heirlooms were to go together; in the present the furniture is to go with the house; it amounts to this, that *Louisa* and *Emily* are to have the furniture, and their children after them.

In this case nothing can be more plain than that the testatrix intended that the house and furniture should go first to the nieces, then to their children, and if none, then to *William*; and the only question is, whether the rules of law prevent that intention taking effect.

The question whether the nieces had any children must be determined, not at the death of the testatrix, but during the lives of the two nieces who take for life, and if during their lives they have any children, then to such children, but if none, then over to *William* and his children; and the rule in *Wild's Case* not being inflexible, the intention of the testatrix can be carried out.

Buffar v. *Bradford* (3) shews that if by giving an estate tail the testator's intention would be defeated, the rule in *Wild's Case* may be departed from, and in this case the direction that the furniture shall go with the house appears to me to be a sufficient reason for not giving estates tail. The devise of the house and the gift of the furniture must be taken together; and by holding that the children take as purchasers, the intention of the testatrix will be carried out as far as is consistent with the rules of law.

I must therefore hold that the nieces *Louisa* and *Emily* take the house and furniture for their lives, with immediate remainders to

(1) 6 Rep. 16 b. (2) 10 H. L. C. 171. (3) 2 Atk. 220.

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the children of each; the effect being that *Louisa*, who is still alive, is entitled to one moiety of the house and furniture for her life, with remainder to her children, and, the time at which the class of children take being the death of the tenant for life, all children coming into *esse* within that period will take with them; and the child of the other niece, *Emily*, who is dead, is entitled absolutely to the other moiety of the house and furniture.

Solicitors for the Plaintiffs: Messrs. *Williamson, Hill, & Son.*
Solicitors for the Defendants: Messrs. *Stephens & Matthews.*

V.-C. M. 1867 *March* 22.

In re OVEREND, GURNEY, AND CO. *Ex parte* LINTOTT.

Winding-up—Interest on Call—Notice to pay Interest under 3 & 4 *Will.* 4, *c.* 42, *s.* 28.

A notice of a call on a contributory under a voluntary winding-up under the supervision of the Court, stated that if the call was not paid at the time appointed, interest would be charged thereon at the rate of 5 per cent. The articles provided for interest on calls:—

Held, that the notice that interest would be charged came within the 28th section of 3 & 4 Will. 4, c. 42; and the Court ordered the contributory to pay the call with interest thereon up to the date of payment.

THE question in this case was, whether contributories in *Overend, Gurney, & Co., Limited*, were to pay interest upon a call which had been made upon them, Mr. *Lintott's* being a representative case.

The company being in the course of a voluntary winding-up under the supervision of the Court, the liquidators in the month of August, 1866, made a call, payable on the 15th of September. At the foot of the notice of the call was the following:—

"N.B.—Should the above call not be paid at the date named, interest will be charged thereon at the rate of £5 per cent. per annum."

This notice was received by Mr. *Lintott* on the 29th of August.

The articles of association of the company provided that if before or on the day appointed for the payment, any member did not pay the amount of the call to which he was liable, then such member should pay interest for the same from the day appointed for the payment thereof to the time of actual payment, at such rate, not being less than five per cent., as might from time to time be fixed by the directors at any meeting of the board, and notified to the members in the notice given of the call.

Mr. *Roxburgh*, Q.C., and Mr. *Ferrers*, for the official liquidators:—

The contract between the members of this company was, that each member should pay £50 per share on each share held by him, in such proportions as might be called; and that if any member did not pay the money at the time fixed for payment, he should pay interest until the time of payment. Sect. 75 of the *Companies Act* of 1862 makes the liability a specialty debt. Sect. 133 authorizes the making of calls by liquidators under a voluntary winding-up, and under sect. 151 such call shall be equivalent to one made under a compulsory winding-up.

This is a demand for payment, and an intimation that if payment be not made at the time appointed interest will be charged thereon, and as such comes within the 28th section of the statute 3 & 4 Will. 4, c. 42. At law that would have been sufficient to have entitled the official liquidators to interest by way of damages. In winding up a joint stock company, interest will be allowed in all cases where it could have been recovered by way of damages at law: *In re State Fire Insurance Company* (1).

Mr. *Swanston*, for Mr. *Lintott*:—

Mr. *Lintott* is not liable to pay interest; he is only bound to pay the amount of his call, and there has not been and could not have been any call for interest; and under a voluntary winding-up under the supervision of the Court, the Court acts merely ministerially, and can only enforce what the liquidator has done out of Court. The note at the foot of the notice is not a call; a four day order can be obtained at any time to compel payment, but such a notice as the present is perfectly novel. Had an order been

(1) 2 H. & M. 722, 10 Jur. N.S. 1176

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made by the Court for payment of a sum of money, then, under the statute 1 & 2 Vict. c. 110, s. 18, interest at 4 per cent. would have run, it being equivalent to a judgment, but here there has been no such order.

This is not a directors' call, the functions of the directors having ceased from the date of the winding-up; and therefore none of the provisions of the articles of association can apply to this case, which depends on the statutory powers of the Court, and there is nothing in the Act as to interest on calls.

But it must be shewn that under the articles of association we are liable for interest, and that all the requisitions of the articles have been complied with: *In re Barned's Banking Company* (1). The articles of association require twenty-one days' notice of the call, which Mr. *Lintott* did not have.

Mr. *Roxburgh*, in reply.

Sir R. Malins, V.C.:—

This is a call made upon a contributory after the order to wind up, which requires him to pay £10 per share on the 15th of September, 1866, and he is told by a note at the foot of the call notice, that should the above not be paid by the date named, interest will be charged thereon at the rate of 5 per cent. per annum. Now the meaning of that is plain enough: it would have been absurd to have put anything in the body of the call upon the subject of interest, because the call assumes that everybody will pay at the time named; but by way of precaution the shareholders are told that if they do not pay, interest will be charged; and that is as distinct an intimation as the circumstances permitted to be given, that those who did not pay at the time fixed would not only be charged with the call, but that payment of interest would be enforced.

Under these circumstances, is the contributory liable to interest? These parties are associated together by articles of association, and the principle of the association is that every member takes one share at least of £50, and contracts with every other shareholder that he will be liable up to the extent of

(1) Law Rep. 2 Ch. 350.

£50 upon each; and, further, that whenever any calls are made, he will pay to the common fund such calls to meet the debts and liabilities of the company, with interest on such calls at the rate of not less than £5 per cent. if they are not paid at the proper time. It is very true that the articles of association contemplate calls being made by directors, but the company being wound up, it is no longer possible for the directors to make calls; that is the substance of the contract between the different members of the company.

It was argued on Mr. *Lintott's* behalf that it would be highly unjust that this gentleman, who is more than six months in arrear, should now be called upon to pay interest; but if it is unjust for him to pay interest, surely justice would require that the interest should be returned to those who have paid it, because the principle of this association is, equality of contribution for the common burdens, and equality of advantages from the profit of the business; therefore, I think that the argument of injustice entirely falls to the ground, and I think it would be the height of injustice if every contributory who is in arrears is not to pay interest during the time he is in arrear.

Then it becomes a question of my power to make him pay interest. It is contended that the Court can only give interest where it has ordered money to be paid, and it is quite true that up to the time of this order I am about to make, there is no order of this Court upon this gentleman to pay the call.

But, although the call is not made by the directors, the substance of the contract, as I have already stated, is, that when any call, by whatsoever means, or by whomsoever made, is required to pay the common debts, every contributory should pay the amount of his call, and also interest for the time during which this call is in arrear. I consider that contract still in force. It is not abrogated by the order to wind up. There are some things in which the contract remains in force, and it is perfectly clear that, notwithstanding the winding-up order, the amount of the liability of the shareholders remains in full force; and equally clear to my mind is the obligation of the shareholders to pay interest, if they do not meet their call at the time required for payment.

Under these circumstances am I armed with the power of com-

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pelling the payment of interest? Mr. *Roxburgh* pointed out that which, I think, is conclusive on the subject, that by the 75th section of the Act of 1862, this call, when made, constitutes a specialty debt, therefore the contributory now before me received a notice on the 29th of August that he is to pay a given sum of money, being a call of £10 per share on each of his shares, on the 15th of September. On the 15th of September he becomes indebted to the company as a specialty debtor. He is told that if the call is not paid, interest will be charged thereon. It is, therefore, a notice that if he does not pay the call on that day, he will be required to pay it with interest at 5 per cent. Therefore, this is a specialty debt constituted by the notice, and payable on the 15th of September, accompanied by a notice that if not then paid, interest will be charged.

That being the case, it falls literally within the 28th section of 3 & 4 Will. 4, c. 42, which I have had many times to consider; and it is settled that if notice is given that interest will be required on a debt, the jury may give it. The Judge generally directs the jury to give it, and that course has been followed in this Court by Sir *W. Page Wood*, who held that where justice requires that interest should be paid upon the debt, and where notice has been given that interest would be charged, interest will be given.

In this case, I think justice requires that interest should be paid; and, being armed with the power under the 28th section of the Act, 3 & 4 Will. 4, c. 42, I make the order that Mr. *Lintott* pay the call, with interest thereon at 5 per cent. from the time fixed for payment, and he must also pay the costs of the adjournment of the summons into Court.

Solicitors for the Official Liquidators: Messrs. *Maynard & Co.*
Solicitors for Mr. *Lintott*: Messrs. *Linklaters & Co.*

In re OVEREND, GURNEY, AND CO.

WARD AND GARFIT'S CASE.

V.-C. M.
1867
March 7, 8.

Winding-up — Shareholders — Rectification of the Register — 25 & 26 Vict. c. 89, s. 35.

Upon the purchase of shares in a banking company, the transfer was executed by both transferor and transferee, and left at the office of the company by the transferee for registration, the day before the company stopped payment. A voluntary winding up was ordered to be continued under the supervision of the Court, and the official liquidators registered all the transfers lying at the office :—

Held, that the Court had power, under the 35th section of the *Companies Act*, 1862, to rectify the register; and ordered that the name of the transferee should stand on the register and the list of contributories in place of that of the transferor.

2 H.L. 324
5 Eq. 197, 200
201
17 Eq. 276
24 BD 477

THIS was an adjourned summons upon the application of *Charles Ward* that his name might be removed from the register of shareholders, and from the list of contributories, in respect of forty shares alleged to be held by him in the above company, and that the name of *William Garfit* might be substituted for that of *Charles Ward.*

The case was heard upon the following admissions :—

1. That the forty shares in question in this matter were sold on the *Stock Exchange* in the usual way, and the transfer of such shares, dated the 3rd of May, 1866, was made from *William Garfit* to *Charles Ward,* and was executed by the transferor on the day of the date thereof, and was, on the same day, delivered to the brokers of the transferee, and was executed by the transferee on or before the 9th of May, 1866.

2. That the name of *Charles Ward* was already on the share register of the company as the owner of forty shares, but he was not upon the register of shareholders as the transferee of the other forty shares now in question on the 10th of May, 1866, the date of the stoppage of the company, but that the transfer, with the share certificates, had, on the preceding day, been sent to the office of the company by or on the part of Mr. *Ward,* and was then lying there for registration at his request.

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3. That a Petition for winding up the company was presented to this Court on the 11th of May, 1866, and on the same day Messrs. *Turquand* and *Harding* were appointed provisional liquidators.

4. That no order was made on such Petition for a compulsory winding-up, but a voluntary winding-up was duly determined on by the shareholders, and an order for continuing the voluntary winding up of the company under the supervision of the Court was made on the 17th of June, 1866.

5. That Messrs. *Turquand* and *Harding* were thereupon appointed the liquidators of the company.

6. That on or after the 25th of June, 1866, the liquidators registered all the transfers, 123 in number, lying at the company's office at the time of the stoppage, including the transfer to Mr. *Ward.*

7. That Mr. *Ward's* name was now on the register of shareholders, and he was, on the 20th of July, 1866, duly settled on the list of contributories to the company, in respect of the forty shares so sold by Mr. *Garfit.*

Upon the hearing of the summons in Chambers, on the 28th of November, 1866, the Chief Clerk decided that he had no power to alter the register, and the question was adjourned into Court for argument, as it affected a large class of shareholders in a similar position to the applicant.

The following were the articles of association applicable to this question:—

11. No transfer of shares shall be entered on the books of the company unless duly executed by the transferor and transferee, and the transferor shall be deemed to remain a holder of such shares until the name of the transferee shall be entered on the register in respect thereof.

The 12th article provided that the directors might refuse to register the instrument of transfer, unless the transferee were approved by the board.

By the 17th article, all deeds of transfer were to be deposited with the directors, or some person for the time being authorized by them in that behalf, accompanied with such evidence as the directors should require to prove the title of the transferor, and thereupon, subject to the provisions of the 12th article, the directors,

or such authorized person, should register the transferee as a member.

Mr. *Cotton*, Q.C., and Mr. *Lindley*, for Mr. *Ward*:—

At the period of dissolution of this company, the name of Mr. *Garfit* was then standing upon the register as the holder of these forty shares, and as the directors had, after that time, no power to exercise the discretion given to them by the 12th article of association, no one else could alter the register. The liquidators had no power to act in the matter, nor had the Court; consequently, Mr. *Garfit's* name must remain on the register, and he must be held liable for the shares standing in his name.

After the transfer, which was, no doubt, properly executed in this case, meetings of the directors took place, where it was, of course, open to them to have given some directions as to the acceptance or non-acceptance of the transfers then lying in the office for registration; but no such directions were given, and this transfer was not sent in till the day before the stoppage.

The 84th section of the *Companies Act* provides that a voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing such winding-up. Then the 151st section provides, that where an order is made for continuing a winding-up, subject to the supervision of the Court, the liquidators may, subject to any restrictions imposed by the Court, exercise all their powers without the sanction or intervention of the Court, in the same manner as if the company were being wound up voluntarily. By the 153rd section, where any company is being wound up by this Court, or subject to the supervision of the Court, all dispositions of the property and effects of the company, and every transfer of shares or alteration in the *status* of the members of the company, made between the commencement of the winding-up and the order for winding-up, shall, unless the Court shall otherwise order, be void. And in the case of a company being wound up voluntarily, it is provided by the 131st section that all transfers of shares taking place after the winding-up order shall be void.

Thus the only persons authorized to sanction the transfer were the directors, and as they had not done so before the winding up of the company, the liquidators could not do so unless they had power

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to rectify the register—which they have not. The only power to rectify the register is in the Court, and, according to the decisions which have been made in similar cases, the Court will not rectify the register so as to place upon it, transferees of shares who have not been approved by the directors.

It was decided in *Walker's Case* (1) that this Court could not substitute its discretion for that of the directors. And in *Shepherd's Case* (2), the Master of the Rolls held, that where the directors had refused to sanction a transfer, the official liquidator, after the order to wind up, had no power to put any one else upon the list of shareholders. He was bound to take the register exactly as he found it; and this decision was confirmed on appeal (3). By the case of *Bermingham* v. *Sheridan* (4), it was decided that if the directors did not approve of a transfer, the contract could not be enforced.

Mr. *Roxburgh*, Q.C., and Mr. *Ferrers*, for the official liquidators.

Mr. *Baily*, Q.C., and Mr. *Rogers*, for Mr. *Garfit*:—

It is not denied that Mr. *Ward* was a perfectly fit and proper person to be placed on the list of shareholders in respect of these shares. The fact that he was already the holder of forty shares in his own name is sufficient proof that the directors would have sanctioned the transfer to him. Both transferor and transferee were probably equally eligible, but as the transfer never was registered, the question now is, whether there is jurisdiction either in the official liquidators or the Court, to complete the registration. Both parties had signed the transfer before the winding-up order was applied for, and the transfer was actually left at the office for registration by the transferee himself, and it only required the form of registration to be complete.

Under the *Companies Act* of 1862 (25 & 26 Vict. c. 89), the power of the liquidators is defined. By the 95th section of that Act it is provided that they shall have the power to carry on the business of the company so far as may be necessary for the beneficial winding up of the same. They may sell real and personal

(1) Law Rep. 2 Eq. 554.
(2) Ibid. 564, 12 Jur. N.S. 698
(3) Law Rep. 2 Ch. 16, 12 Jur. N.S.
(4) 33 Beav. 660.

property, and execute transfers of such property. They may do all acts, and execute in the name and on behalf of the company all deeds, receipts, and other documents, and use for that purpose, when necessary, the company's seal. They may draw, accept, and indorse bills of exchange and promissory notes in the name of the company, and do all other acts that may be necessary for winding-up the affairs of the company; and the 96th section enacts that the Court may provide that the official liquidator may exercise any of these powers without the authority and intervention of the Court. We contend, therefore, that the liquidators had power to register the transfers left at the office for registration, and which would have undoubtedly been registered by the directors but for the winding-up.

In *Bermingham* v. *Sheridan* (1), the Court refused to interfere because the official liquidator, in the exercise of his discretion, had declined to sanction the transfer. The question in fact was, whether the directors could be compelled to assent to the transfer, and the Court refused to interfere when the official liquidator had refused to register the purchase.

In *Emmerson's Case* (2), the Master of the Rolls held that the Court had a discretion to make valid all dealings with the shares between the presentation of a Petition for winding up the company and the order made upon it, and he distinctly recognised the right of the Court to interfere. This point was confirmed on appeal (3), although the Appellate Court reversed the decision of the Master of the Rolls upon another point. It was considered by Lord Justice *Turner* that the discretion given by the 153rd section of the *Companies Act*, 1862, authorized the Court to say that a transfer of shares, or an alteration of the *status* of a member of the company, might be valid, notwithstanding it took place after the commencement of the winding-up.

So in *Ward's Case* (4), it was decided that in settling the list of contributories the Court is not bound by the register of shareholders, but has authority to rectify the register, and to determine the question who is in equity the real owner of the shares, and there the equitable owner of the shares was placed upon the list

(1) 33 Beav. 660.
(2) Law Rep. 2 Eq. 231, 12 Jur. N.S. 494
(3) Law Rep. 1 Ch. 433, 12 Jur. N.S. 592.
(4) Law Rep. 2 Eq. 226, 12 Jur. N.S. 493.

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instead of the registered owner, the former not having been registered on account of disputes between the purchasers. The Master of the Rolls there said that the 35th section of the Act of 1862 enabled the Court to correct inaccuracies in the register of shareholders.

The 35th section itself confers sufficient power on the Court to do what we now ask. The Court may, by that section, if satisfied of the justice of the case, make an order for the rectification of the register, and may decide on any question relating to the title of any person to have his name entered in or omitted from the register, and may generally decide any question that it may be necessary or expedient to decide for the rectification of the register.

In *Nation's Case* (1) the Court placed the transferee of shares on the list of contributories, although he had not been registered, some delay having occurred in effecting the registration. The Master of the Rolls there distinguished *Shepherd's Case* (2), and stated under what peculiar circumstances he had refused to place Mr. *Shepherd's* name on the register.

In all these authorities the power of the Court to rectify the register of shareholders is distinctly recognised; and there can be no doubt that this is a case in which that power ought to be exercised.

Mr. *Cotton*, in reply:—

The *ratio decidendi* in *Shepherd's* and *Walker's Cases* was, that after the winding-up order there could be no alteration in the register, unless it was improperly constituted at the date of the winding-up order. That is not alleged here; and in *Walker's Case* it was held that the discretion of the Court could not be substituted for that of the directors.

SIR R. MALINS, V.C.:—

This is a point of the highest importance, and in this particular company it is stated that the decision will regulate a number of other cases. I have been referred to most of the authorities; and

(1) Law Rep. 3 Eq. 77.

(2) Law Rep. 2 Ch. 16, 12 Jur. N.S. 897

although at first I thought my duty would be to delay giving judgment until after the appeal in *Ward's Case* had been determined, on further consideration I do not think it necessary (1). The transfer was executed by the transferor on the 3rd of May, and subsequently by the transferee, and what more remained to be done, in order to complete the legal transfer, was simply an entry in the books of the company, which was a purely ministerial act. It is true that, under the 12th of the articles of association, it is provided that the directors may refuse to register a transfer; but unless the directors raised an objection, Mr. *Ward's* name would have been registered. Instead of that, the official liquidators, who represent the interests of all parties, being satisfied that Mr. *Ward* was a proper transferee, a "good man" as it is called in City parlance, put him on the register. I must assume, therefore, that Mr. *Ward's* name would have been accepted by the directors if the matter had come before them, and the stoppage of the company, on the 10th of May, was the sole impediment to the completion of the legal transfer. Under these circumstances, the question is, who ought to be put on the register? It is contended that I have no right to interfere with the register as it stood on the day of the winding-up order. If I refuse to change the register, then Mr. *Garfit's* name must stand; but it is clear, on every principle, that Mr. *Ward* must accept these shares. He has paid his money; Mr. *Garfit* has done all that was required of him; and if, instead of falling, the value of these shares had increased, it would have been for the benefit of Mr. *Ward*. He is bound, therefore, on every principle, to carry out his contract; and if I refused to place his name on the list, I should be handing the parties over to a Chancery suit, Mr. *Garfit* having a right to file a bill against Mr. *Ward* to indemnify him against the calls.

I come to the conclusion, therefore, without the least doubt, that the name of Mr. *Ward* ought to be on the register; and if that is so, the sole question is, whether I have the power to put his name there, treating it as if Mr. *Garfit's* name still remained on the register, and this was an application to put Mr. *Ward's* name on

(1) This appeal was determined on the 21st of March, and is reported as *Ward and Henry's Case*, Law Rep. 2 Ch. 431.

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29 BD 466

and take his off. The 153rd section is inapplicable, this transaction having taken place before the commencement of the winding-up —that is, except the mere ministerial act of registering, which was an act of the company. But Mr. *Baily* drew my attention to the 35th section, the force of which I more strongly feel, because if the Court is not armed with this power, not only should I, as I have said, be handing over Mr. *Garfit* to a Chancery suit, but the 120 other persons who are in the same circumstances. I am of opinion that this section is clearly expressive of the fact that the attention of the Legislature has been drawn to the point. Am I, then, armed with this power? The terms of the 35th section are very extensive, and give a general power, of which there are numerous instances; and the Court may, either with or without costs, if it is satisfied of the justice of the case, make an order to rectify the register generally. That is an absolute power, where the circumstances are such as, in the opinion of the Court, call for its exercise. The Court is armed with power (which is the important part of the section) to decide any question "necessary or expedient" for the rectification of the register; and I am now called on to decide whether the equitable title, which is clearly vested in Mr. *Ward*, must not be completed by making it legal, and whether he must not fulfil all the obligations which such legal title would throw upon him. I am of opinion that I am armed with this power, and that Mr. *Ward's* name, and not Mr. *Garfit's*, ought to be put on the register. The authorities are very numerous. As to *Walker's Case* (1), I am not able satisfactorily to follow the reasoning of Sir *Richard Kindersley*, although I should have felt bound by his decision if it had been in point; but there was this remarkable difference there, that the transfer was not executed by the transferee. *Shepherd's Case* (2) turned on the fact that the directors had exercised their discretion as to approving of a transferee; and the Master of the Rolls and the Court of appeal proceeded on this ground, that the exercise of discretion could not be altered by the Court. As to *Ward's Case*, which is now under appeal, the principles laid down by the Master of the Rolls are so distinct, and in accordance with the view I take in this case, that I do not

(1) Law Rep. 2 Eq. 554.

(2) Law Rep. 2 Ch. 16. 12 Jur N.S. 897

think it necessary to await the decision of the superior Court in that case. (1)

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On all these grounds Mr. *Garfit's* name must be taken off the register, and Mr. *Ward's* substituted for it.

Solicitors for the Applicant: Messrs. *Swann & Tweed.*
Solicitors for *William Garfit*: Messrs. *Clayton & Sons.*
Solicitors for the Official Liquidator: Messrs. *Maynard, Son, & Co.*

(1) Reported 2 Ch. 431

In re WEY AND ARUN JUNCTION CANAL COMPANY.

V.-C. M. 1867 March 8.

Winding-up—25 & 26 Vict. c. 89, s. 199—Company incorporated by Special Act—Just and equitable Clause.

Winding-up order made in the case of a canal company incorporated by special Act of Parliament, on the ground of its being just and equitable, under the 199th section of the Act of 1862, the canal being worked at a loss.

5 Ch. 601
10 Eq. 333
336, 340,
17 Eq. 183
186, 8.

THIS Petition was presented by four shareholders, praying the winding up of the *Wey and Arun Junction Canal Company.*

The company was incorporated by Act of Parliament in 1813. For many years prior to 1866, the shareholders had received an average dividend of only 4*s.* 10*d.* per cent. Since then the traffic had diminished, and the working expenditure had exceeded the profits, though for the whole canal of eighteen miles, with many locks, only two men were employed; and a railway running nearly parallel to the canal having been recently opened, it was expected that the traffic would be still further diverted from the canal.

Under these circumstances, the present Petition for winding up was presented, alleging that the company was wholly unable to pay its debts; that the continuance of the undertaking would only lead to the loss of the property of the company; and that it was just and equitable, and for the benefit of all parties, that the company should be wound up.

Some affidavits had been sworn on the part of the shareholders opposing the winding-up order, disputing the fact that the canal could not be worked profitably.

In order to complete the winding up the Court thought it was proper that the property should vest in the company to obtain a power for that purpose (3 & 32 Vict. c. clxxiii) see 10 Eq. 335 n. (3)

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Mr. *J. N. Higgins*, in support of the Petition, asked for a winding-up order under the 199th section of the *Companies Act* of 1862, on the grounds above stated. The Court had made a winding-up order in the case of a company incorporated by special Act of Parliament: *In re Basingstoke Canal Navigation Company* (1). The only companies excepted from the operation of the Act of 1862 were railway companies.

Mr. *Method*, for the company, supported the Petition.

Mr. *Horton Smith*, for the Commissioners of the Port of *Arundel*, who were interested in five shares in the company:—

This Petition is, in effect, an attempt, under the *Companies Act* of 1862, to repeal the private Act incorporating this company, which is not specially referred to in the Act of 1862. The special Act contains provisions shewing that it was the intention of the Legislature that the canal should be maintained and worked in perpetuity; and the Court will not, by the machinery of a winding-up order, allow a company thus formed to annihilate itself.

There has been no similar case where an order has been made for a winding-up order where any opposition has been offered to such order. The order was not opposed in the case cited on the other side.

Moreover, the public have acquired the right, under the Act, of being carried for toll over the canal; and the Court has no jurisdiction to deprive them of that right.

We also dispute the fact that the canal cannot be worked profitably.

Sir R. Malins, V.C.:—

I am of opinion that the condition of this company is such that it is just and equitable, and for the benefit of all parties, that it should be wound up. The special Act incorporating the company contemplates, it is true, its existence in perpetuity; but circumstances have arisen which could not have been contemplated at the time when that Act was passed. The canal is now useless and profitless, its revenue scarcely being sufficient to pay the working expenses.

(1) M. R. June 23rd, 1866. 14 W.R. 956.

The question then arises whether I have jurisdiction to make the winding-up order. It appears to me that the 199th section of the Act of 1862, which is very comprehensive in its language, gives the Court power to wind up this canal company, that section enabling the Court to wind up all companies except railway companies.

It was contended that one Act of Parliament could not be repealed by another Act, unless by express reference to it. But the effect of the winding-up order is not to repeal the special Act, but only to give the Court control over the affairs of the corporate company.

I must, therefore, make the winding-up order; the costs of the Petitioners will come out of the estate; but the shareholders who have opposed the Petition will have no costs.

Solicitors for the Petitioners: Messrs. *Pyke & Irving.*
Solicitors for the Port of *Arundel:* Messrs. *Holmes & Impey.*

M. R.

1867

June 14, 17.

SYKES *v.* SYKES.

Will—Codicil—Bequest of Residue to Five as Tenants in Common—Bequest as to One, revoked, and Legacy substituted.

14 L.R. Eq. 849
15 L.R. Eq. 637

A testator, by his will, gave his residuary real and personal estate to trustees upon trust for his "five sons," *A.*, *B.*, *C.*, *D.*, and *E.*, as tenants in common, and by a codicil "revoked and made void all the trusts, powers, provisoes, directions, clauses, matters, and things in his will contained, concerning his residuary estate, so far as the same trusts, &c. related to or affected his son *E.*, or his right, interest, or claim thereto or therein," and "in lieu thereof" he gave £15,000 to the trustees upon trust for *E.*, his wife and children, and if *E.* should have no children, he directed that "the said legacy" should sink into his residuary estate, but so that *E.* or his representatives should not take any share or interest therein:—

Held, that the testator died intestate as to the trusts of one-fifth share of his residuary estate, and that the legacy of £15,000 was not payable out of such share, but was payable before the residue was ascertained.

Affd. by L.C. H.L. 3 Ch. 760

JOSEPH SYKES, by his will, dated the 16th of March, 1853, gave his real and residuary personal estate to trustees (whom he also appointed to be his executors), upon trusts for conversion and investment, and, subject to the payment to his widow of an annuity of £300, he directed the trustees to stand possessed of the said trust funds in trust for his five sons, *Joseph Alfred Sykes*, *Cam Sykes*, *Reginald Sykes*, *Nicholas Sykes*, and *Daniel Sykes*, as tenants in common in equal shares, except that *Reginald's* share should be £4000 less than the respective shares of his brothers, to be paid to them as and when they should attain the age of twenty-one years; and if any of his said sons should die in his lifetime, or under the age of twenty-one years, leaving issue, such issue should be entitled in equal shares, and with benefit of survivorship between them, to their parent's share, whether original or accruing, to be paid to them as they should attain the age of twenty-one years; but if any of his said sons should die in his lifetime, or under the age of twenty-one years, without leaving issue, or leaving issue, and all such issue should die under the age of twenty-one years, then the shares, whether original or accruing, of such sons or their issue, should be divided equally among the other sons then living, and

the issue of the deceased sons *per stirpes*, to be paid at the same times and in like manner as their original shares.

The testator, by a codicil dated the 5th of June, 1856, after reciting the devise and bequest of his real and residuary personal estate, proceeded as follows :—

"Now I do hereby revoke and make void all and every the trusts, powers, provisoes, directions, clauses, matters, and things in my said will contained of and concerning the said trust moneys, stocks, funds, and securities, so far as the same trusts, powers, provisoes, directions, clauses, matters, and things relate to or affect my said son, *Reginald Sykes*, or his right, interest, or claim thereto or therein;" and "in lieu thereof" he gave to the trustees £15,000 upon certain trusts for the benefit of *Reginald* and his wife for their lives, and of the children of *Reginald* who should attain twenty-one; and if no child of *Reginald* should take a vested interest in the said legacy, he directed that the same should sink into and be deemed part of his residuary personal estate, "so nevertheless that my said son, or his representatives, shall not take, have, or be entitled to any share or interest whatever therein."

The testator died in May, 1857, leaving his wife and his said five sons, all of whom attained twenty-one, and two daughters. The trustees and executors got in and converted the real and personal estate, and after setting apart funds to answer the annuity and the legacy of £15,000, divided the residue among *Joseph Alfred Sykes*, *Cam Sykes*, *Nicholas Sykes*, and *Daniel Sykes* equally. *Joseph Alfred Sykes*, who was the testator's heir, had since died.

In 1865, *Reginald Sykes* filed the bill in this suit, as one of the next of kin of the testator, against the trustees and executors, raising the question whether the testator did not die intestate as to the share of his residuary estate given by his will to the Plaintiff, and praying for a declaration of the true construction of the will, and for the administration of the testator's real and personal estate.

Reginald Sykes died in September, 1865, and the suit was revived by his widow and executrix; and the bill was amended by making *Cam Sykes*, *Nicholas Sykes*, *Daniel Sykes*, and the executors of *Joseph Alfred Sykes*, Defendants.

M. R. 1867 SYKES v. SYKES.

Upon the cause coming on to be heard on the 31st of May, 1867, the counsel for the trustees having objected that the question of construction could not be decided in the absence of the testator's widow and daughters, the Master of the Rolls said that they might appear by counsel, and he would then hear the cause.

Mr. *Selwyn*, Q.C., and Mr. *Bedwell*, for the Plaintiff:—

It is well settled that where, as in this case, a testator makes a residuary bequest to several persons *nominatim* as tenants in common, and afterwards by codicil revokes the bequest as to one of such persons, his share does not go to the others, but is undisposed of: *Cresswell* v. *Cheslyn* (1); *Humble* v. *Shore* (2); *Lightfoot* v. *Burstall* (3); *In re Wood's Will* (4).

Mr. *Speed*, Mr. *E. S. Ford*, and Mr. *Fry*, for the testator's widow and daughters, supported the Plaintiff's contention, and cited *Lloyd* v. *Lloyd* (5); *Ramsay* v. *Shelmerdine* (6); *Skrymsher* v. *Northcote* (7).

Mr. *Baggallay*, Q.C., and Mr. *Wickens*, for the trustees.

The *Attorney-General* (Sir *John Rolt*), and Mr. *Rendall*, for the testator's three surviving sons, and the executors of *Joseph Alfred Sykes*:—

It is true that if a testator simply revokes the bequest of a share of residue to an individual, and gives no indication of an intention to dispose of such share, it does not fall into the residue; but this testator has shewn a clear intention to dispose of the whole of the residuary estate. He revokes, not the bequest to *Reginald*, but all the trusts, &c., in his will contained, so far as they relate to *Reginald*; in other words, he directs the residuary bequest to be read as if *Reginald's* name had been omitted, and it then stands as a bequest of the whole to the other four sons. The distinction between revoking a bequest and striking the legatee's name out

(1) 2 Ed. 123; 3 Bro. P. C. (Toml.) 246.
(2) 7 Hare, 247; see 1 H. & M. 550.
(3) 1 H. & M. 546.
(4) 29 Beav. 236.
(5) 5 Jur. 673.
(6) Law Rep. 1 Eq. 129.
(7) 1 Sw. 566.

of the will was acted upon in *Harris* v. *Davis* (1), where the words of revocation were very similar to those in this codicil, and is supported by the observations of Lord *Hardwicke*, in *Humphrey* v. *Tayleur* (2), and is laid down as a recognised distinction in *Jarman* on Wills (3). In *Humble* v. *Shore* (4), and in *Shaw* v. *McMahon* (5), the Court treated the question as one of intention to be collected from the whole will and codicil. Here the testator, by the provisions for accruer in his will, has expressed a clear intention that his sons should between them take the whole of the residue, and the express direction in the codicil that upon the £15,000 in a certain event falling into the residue, *Reginald* is to take no share of it, shews distinctly that he did not intend to die intestate as to any part of the residue, for in that event *Reginald* would participate as one of the next of kin. But if the whole of the residue is not effectually given to the other four sons, the express exclusion of *Reginald* from any benefit is equivalent to a bequest of the fifth share to all the testator's next of kin, except *Reginald*: *Lett* v. *Randall* (6); *Vachell* v. *Breton* (7); *Thompson* v. *Watts* (8). In either case, the Plaintiff has no *locus standi*.

Further, if the codicil is to be construed as a revocation of the bequest to *Reginald*, and not as a gift of the whole residue to the other four sons, the legacy of £15,000, which is given in lieu of *Reginald's* share of the residue, must come out of that share and not out of the whole residue: *Cresswell* v. *Cheslyn* (9); *In re Wood's Will* (10). The testator cannot have intended that the substitution of the legacy for a share of the residue should have the effect of diminishing the remaining shares.

LORD ROMILLY, M.R.:—

There is one point only upon which I wish to hear a reply, and that is, as to the amount of the residue. But I will first state my opinion upon the other point, whether there was an intestacy to a certain extent, as to which I have no doubt.

(1) 1 Coll. 416.
(2) Amb. 136.
(3) Vol. i. p. 158 (3rd Ed.)
(4) 7 Hare, 247.
(5) 4 D. & War. 431.
(6) 3 Sm. & Giff. 83.
(7) 5 Bro. P. C. 51.
(8) 2 J. & H. 291.
(9) 3 Bro. P. C. 246.
(10) 29 Beav. 236.

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It is necessary, considering how this case has been argued, to refer to the canons of construction by which all wills must be regulated. No doubt the first canon of construction is, that the intentions of the testator must be carried into effect where those intentions have been expressed by him, and that the Court will endeavour to ascertain what his intentions are simply by the expressions he has used. Another canon of construction is, that you cannot make a will for the testator, and that if there is any portion of his property that he has not disposed of, you cannot by inference from the rest of his will infer how he would have disposed of it, if the omission had been brought to his attention. There is a third canon of construction, which is very important, that no testator, however clear may be the expression of his intention, can violate a rule of law; he cannot, for instance, however strongly he may wish it, tie up his property beyond the limits allowed by law. With these considerations I proceed to look at this will. What the testator has done is this: he has given his residue to certain trustees upon certain trusts, and those trusts are "in trust for my five sons, namely," and then he mentions the names of the five sons; then he directs that they are to take it as tenants in common; then by a codicil he revokes the trusts of the residue with respect to one of them. Now, first, I will consider some of those cases to which the Attorney-General called my attention, for the purpose of eliminating them from the consideration of this case. In the first place, this is not a gift to a class; if it were a gift to a class, then no doubt the failure of or the revocation of the gift to one of the members of the class would not prevent the survivors from taking the whole; but here the gift is expressly and distinctly to five named individuals. In *Shaw* v. *M'Mahon* (1), it being a doubtful question whether the gift was to a class or to individuals, the Lord Chancellor held that it was a gift to a class; that case, therefore, has no application to the present case. Then we may also discard that class of cases in which property is given to several persons as joint tenants, because in those cases, by the nature of the tenure, the survivors take the property, and the fact of one of the donees having died, or of the gift being taken away from

(1) 4 D. & War. 431.

him by the testator before it takes effect, produces the same result as if his death had occurred immediately after the gift had taken effect, in which case the survivors would have taken the whole.

In this case the residue is given to trustees to be divided amongst five named persons as tenants in common; then by his codicil the testator says, "I hereby revoke and make void all and every the trusts, powers, provisoes, directions, clauses, matters and things in my said will contained, of and concerning the said trust moneys, so far as the same relate to or affect my son *Reginald*." The Attorney-General argued with great ingenuity that this is to be read simply as if he had directed the omission from his will of everything relating to *Reginald;* but if I were so to read it, I should be introducing a different clause from that which the testator has thought fit to make use of: I may observe here incidentally, that the passage read from *Jarman* on Wills, by the Attorney-General, was new to me, and the proposition as there stated seems to me to be put too broadly, and I should like to refer to the authorities there cited for the purpose of ascertaining how such a proposition can be maintained exactly in the form there stated. However, I pass over that, and I return to the argument of the Attorney-General, and I repeat that this is not a direction to omit from the will everything relating to *Reginald*, but to revoke and make void the trust so far as the same relates to or affects *Reginald*. Then I refer to the trusts, and I find the trusts are these: "that the trustees shall stand possessed of the whole, in trust, for my five sons," one of whom is *Reginald*. What is revoked, therefore, is one of the five trusts, that which related to *Reginald*. It is not a direction that his name is to be omitted. The Attorney-General was obliged to admit that he must alter the word "five," because if the word five is left in the will, the trusts would remain, "for my five sons, *Joseph*, *Cam*, *Nicholas*, and *Daniel*," only mentioning four, to take amongst them as tenants in common. Would not *Reginald* take under that trust, if it stood alone, it being proved that there were five sons, and it being expressly a trust for five sons, of whom only four were named? It is, therefore, in my opinion, a revocation and a cancellation, and nothing more than that, of the trust in favour of *Reginald;* it is

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nothing more than a revocation of the bequest in his favour, and the result of that is, in my opinion, that the case of *Cresswell* v. *Cheslyn* (1) applies to this case. Now the case of *Cresswell* v. *Cheslyn*, though it was very much doubted at one time by Serjeant *Hill* and others, has been considered an authority for more than one hundred years; it was affirmed by the House of Lords, and I do not know of a single case in which its authority has been doubted. In the case of *Harris* v. *Davis* (2), Lord Justice *Knight Bruce* affirmed it, and said, unless he could distinguish the case before him from it, he was bound by it; in my opinion, this case cannot be distinguished from it, and therefore I am bound by it.

I will now refer to the particular points in the will and codicil to which the Attorney-General called my attention. In the first place, it is very true, as he stated, that the will expresses the intention, that if *Reginald*, or any of the sons, died without leaving issue, or if all his issue died, then his share should go over to the survivors; but that does not apply to revocation, and the difficulty I have in the case of revocation is this: that, according to the canon of construction to which I have referred, if the testator has not disposed of that one-fifth which he gave to *Reginald*, then this Court cannot give it to other persons upon the belief (however strong that belief may be), that if the difficulty and the consequences of his will had been pointed out to the testator he would have remedied them by giving the share in a particular way. All that the Court can say is, that it is probable he would have done something which he has not done, and which the Court cannot do for him, and the result is, that the rule of law must take effect which applies where a testator has not disposed of his property.

The second point to which the Attorney-General referred was this, that by the codicil the testator has directed that in case of the failure of the children of *Reginald*, the legacy of £15,000 should fall into the residue, "so, nevertheless, that *Reginald*, or his representative, shall take no part of it." What he intended by that was, that the £15,000 should be given to *Reginald* in lieu of his one-fifth of the residue, and whatever might occur to augment the residue, that £15,000 was to be in lieu of the one-fifth. I accept that, I take it to be part of his will; but if he has not disposed of

(1) 2 Ed. 123; 3 Bro. P. C. 246. (2) 1 Coll. 416.

that one-fifth of the residue, then I cannot say that because he has intended that *Reginald* shall not take it by his will, or in any other way, *Reginald* cannot take it by operation of law. The sole question is, whether the testator has disposed of it by his will. There have been many cases in which a testator has directed that if a person obtains certain property by his will, a gift over shall take place, and it has occurred that the person has obtained the property, not by his will, but by reason of his intestacy through the failure of part of the gifts under the will, and it has been held the forfeiture clause did not take effect. The Court drew a distinction in all those cases between what is given by the will and what is taken by operation of law. Has this testator given by his will or codicil the one-fifth of which he has revoked the trusts? I am of opinion that he has not; I am of opinion that *Cresswell* v. *Cheslyn* (1), and many other cases which were cited to me, have determined that.

Then, if it does not pass by his will, he cannot control the operation of law upon that with respect to which he died intestate, however strongly he may have shewn his intention that the rules of law should not apply to that property. I am of opinion, therefore, that with respect to that one-fifth he died intestate, and that the ordinary rules of law must apply, and I will make a declaration to that effect, and a decree accordingly; but I wish to hear a reply upon the question, which is much more difficult, namely, whether the £15,000 is not to be deducted out of the fifth of the residue to be ascertained before that sum of money is deducted.

Mr. *Selwyn*:—

The £15,000 must be paid, like any other legacy, before the residue is ascertained. If the testator, instead of giving £15,000, had given an estate or a specific chattel in lieu of the revoked share of residue, could it be contended that the estate or chattel must be valued, and the value be deducted from the revoked share, or that if after payment of the other legacies the estate had not amounted to £75,000, this legacy of £15,000 would have abated? In *Re Wood's Will* (2) the testatrix expressly declared that the substituted legacy should be part of the share

(1) 2 Ed. 123. (2) 29 Beav. 236.

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of residue given to the deceased legatee; here there is no such direction, but the testator speaks of the £15,000 as a "legacy or trust fund," and directs that in a certain event it shall sink into the residue. If, as has been contended on the other side, the testator intended to have given, and believed that he had given, the whole residue to the other four sons, he must have intended this legacy to be paid before the residue was ascertained. In *Cresswell* v. *Cheslyn* (1) the decree appears to have ordered the substituted legacy to be paid out of the lapsed share of residue. The reasons for making such an order are not reported, and as another legacy of £1000 was also ordered to be paid out of the same share, it is submitted that the case cannot be relied upon as an authority on this point. The Court will not make any declaration upon this question until the accounts have been taken, and it has been ascertained whether there is any residue and what is the amount of it.

June 17. LORD ROMILLY, M.R.:—

I have been looking at this case again very carefully, and I am quite willing to express my opinion on the subject, but I do not think it can be properly entered in the decree, because it is quite clear that the Court cannot properly determine a question of this description without knowledge of what the residue consists; but I am of opinion that it is involved in my decision of the other point, and that the £15,000 is not to be paid out of the share of residue, that is to say, the residue is to be ascertained after the £15,000 is paid. I cannot get over this: the testator does not say that it is to be paid out of the residue, and, supposing the share of the residue were not sufficient to pay it, was not the £15,000 to be paid? So also, supposing the testator had given *Whiteacre* in lieu of the one-fifth of the residue, is it not clear (I am merely adopting Mr. *Selwyn's* argument) that the specifically devised property could not be estimated at any money value? I am of opinion, therefore, as the testator has given £15,000 in lieu of the one-fifth of the residue, that it follows that the residue must be ascertained after that is paid. But I mention this merely for the purpose of stating

(1) 3 Bro. P. C. 246.

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how I intend it to be dealt with in Chambers, in order that the parties may regulate their own proceedings on the subject. Counsel may take a note if they think fit to that effect, but I do not mean to make any declaration further than this, that in the events which happened, the testator died intestate as to the trusts of that one-fifth of the residue which was given to *Reginald*, and then take the usual account of the estate to the testator.

It was subsequently agreed that the executors and trustees should admit that one-fifth of the residue would exceed £15,000, and upon that admission and the request of all parties that his Lordship should express his opinion as to the payment of the legacy of £15,000, it was declared that such legacy ought not to be paid out of the share of the residue ascertained without payment of such legacy, but ought to be paid with the other legacies before ascertaining the residue.

Solicitors for the Plaintiff: Messrs. *Meyrick, Gedge, & Loaden.*
Solicitor for the Defendants: Mr. *Z. Brooke.*

CRAVEN *v.* BRADY.

M. R. 1867 *May* 31; *June* 25.

Will—Forfeiture by Marriage—Appointment—Proviso for Cesser of Life Estate—Acceleration of Remainder.

A testator appointed, under a general power, real estate, and devised other real estate to his wife for life, and from and immediately after her death, to his son, with a proviso that if his wife should "do, make, or execute, any deed, matter, or thing, whereby she should be deprived of the rents and profits, or the power or right to receive, or the control over the same, so that her receipt alone should not at all times be a sufficient discharge for the same, her life estate should cease and determine as fully and effectually as it would by her actual decease." The widow married again, without making any settlement:—

Held, that her life estate ceased upon her marriage, and the remainder, both in the appointed and devised estates, was accelerated.

JEREMIAH DYSON, by his will, dated the 3rd of December, 1855, appointed real estate, over which he had a general power

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of appointment, and devised all his real estates to his wife, *Augusta Dyson*, and her assigns, for her life; and from and immediately after her decease to his son, *Arthur Dyson*, in fee, with executory limitations over in the event of his son dying under twenty-one without leaving issue. And the will contained a proviso that, "in case his said wife should sell, release, or charge her said life estate in the said real estates, or should do, make, or execute, any deed, matter, or thing, whereby, or by means whereof, she should be deprived of the rents and profits of the same, or the power or right to receive, or control over the same, so that her receipt alone should not at all times be a good and sufficient discharge for the same, then her life estate and interest should cease and determine as fully and effectually as it would by her actual decease."

By a codicil the testator revoked the appointment and devise to *Arthur Dyson* in fee, and in lieu thereof appointed and devised the estates, after the death of his wife, to *Arthur Dyson* for life, with remainders over, and appointed *Dacre Craven*, jointly with his wife, guardian and trustee of and for his children. By a second codicil he gave his residuary personal estate to *Dacre Craven* in trust to pay the income to his wife for her life, for her "separate and inalienable use and benefit, independently of any future husband," without power of anticipation, and so that her receipt alone should be a sufficient discharge for such income.

The testator died in February, 1861. In August, 1866, the widow married *Charles Brady*, and no settlement of her property was made. *Dacre Craven* thereupon instituted this suit in his own name and in the name of *Arthur Dyson* (who was an infant) against Mr. and Mrs. *Brady*, and the persons entitled to the real estate in remainder, for a declaration of the true effect of the will as to the real estate in the events which had happened, and for an account of the rents, and for directions for the maintenance of the infant Plaintiff thereout.

Mr. *Baggallay*, Q.C., and Mr. *Cookson*, for the Plaintiffs:—

As the widow by her marriage without a settlement of her life interest to her separate use did a thing whereby she was deprived of the right to receive the rents of the appointed and devised estates, and her receipt ceased to be a sufficient discharge for the

rents, her life estate thereupon ceased under the forfeiture clause. In an *Anonymous Case* in *Moore* (1) it is laid down that "taking of baron is an assignment;" and, in another case in *Moore* (2), the majority of the Court thought that a proviso in a lease for re-entry, if the possession of the tenements should come into the hands of any one else than the lessee and his wife and their issue, took effect on the second marriage of the wife. *Bonfield* v. *Hassell* (3) is distinguishable from this case. There the Court held that the wife's annuity did not become vested in the husband on marriage; but here there can be no question about the right to receive the rents being in the husband; moreover, in that case the annuity being created by deed, the deed was construed strictly against the grantor, and he had paid the annuity after the marriage. A gift over is not essential to the validity of a proviso for cesser of a life estate on alienation, or, in the case of real estate, on marriage. Upon the determination of the life estate the estate in remainder of the infant Plaintiff was accelerated: *Lainson* v. *Lainson* (4). [They also referred to the cases cited in the note to *Avison* v. *Holmes* (5).]

Mr. *Selwyn*, Q.C., and Mr. *Beck*, for Mr. and Mrs. *Brady*:—

A condition against alienation annexed to a gift to one "and his assigns" is repugnant and void; and a proviso for forfeiture on marriage without a gift over is void: *Lloyd* v. *Branton* (6); *Jarman* on Wills (7). The direction that the life estate shall cease as if the tenant for life were dead is no gift over: *Lambarde* v. *Peach* (8). The forfeiture clause in this will was intended to apply exclusively to acts to be done by the widow with direct reference to the property, not to her marriage, in consequence of which, by operation of law, she is deprived of the control over it. If the testator had intended to deprive her of the estate on second marriage he would have so expressed it; and it is clear, from the provisions of the second codicil, that he contemplated her second marriage. This, being a condition subsequent, will be construed strictly, and the

(1) Moore, t. Eliz. p. 11, No. 40.
(2) Moore, t. Eliz. p. 21, No. 71.
(3) 32 L. J. (Ch.) 475.
(4) 18 Beav. 1; 5 D. M. & G. 754.
(5) 1 J. & H. 540.
(6) 3 Mer. 108, 117.
(7) Vol. ii. p. 43, 3rd Ed.
(8) 4 Drew. 553,

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Court will not imply a condition in restraint of marriage. If, however, the life estate is forfeited, the remainder is not accelerated, at all events in the case of the appointed estates: *Jarman* on Wills (1), and the persons entitled in default of appointment must be made parties to the suit. [They also cited, as to the construction of the forfeiture clause, *Doe* v. *Carter* (2).]

Mr. *Wingfield*, for the other Defendants.

Mr. *Baggallay*, in reply:—

It is not necessary to construe the forfeiture clause as a restraint on marriage, for if the widow had settled the rents to her separate use there would have been no forfeiture. The testator's object was to prevent any other person than his wife and children having the enjoyment of the property. The rule that when an appointed life estate fails the appointed remainder is not accelerated, does not apply where the appointor has clearly expressed an intention to the contrary.

June 25. LORD ROMILLY, M.R., after stating the facts, and observing that the will contained no gift over in the event of the forfeiture, continued:—

The first question is, whether the marriage of the testator's widow, under these circumstances, created a forfeiture of her life estate; and, if so, the second question is, where the property goes during the remainder of her life.

As to the first point, it is, I think, impossible to say that a forfeiture has not been created by her act. In other words, it is impossible truly to say that she has not done an act whereby she has been deprived of the right to receive, or of the control over, the rents, so that her receipt alone is no longer a good and sufficient discharge for the same. As nothing has been done on her marriage, either by her or her husband, to settle this property, her husband now has alone the right of giving a discharge for the rents, and her receipt alone is not a good and sufficient discharge for them. It is true, that the testator by the second codicil contemplated that she

(1) Vol. i. p. 543. (2) 8 T. R. 57, 300.

might take a second husband, but if she did so, it was necessary, in order to prevent the operation of the forfeiture clause, that she should, by some instrument, reserve to herself the sole and exclusive right of receiving the rents and of giving discharges for them. It is true also that conditions in restraint of marriage, where there is no gift over, are disregarded in equity, but this rule does not apply to such a condition when it is in restraint of the second marriage of the testator's widow, and assuming that this testator did not intend to prevent his widow's second marriage, he did intend that if she did not secure to herself the exclusive right of receiving the rents, and of giving receipts for the same, she should cease to have any interest in the property. I am, therefore, I regret to say, compelled to come to the conclusion that the inadvertence of this lady and her husband to execute some deed on her marriage, by which the rents should be secured to her alone, has created a forfeiture of her interest.

With respect to the second question, I think that the estate for life of the son is accelerated as regards the property devised by the testator, as distinguished from the property appointed by him under the power. This is, I think, settled by numerous cases. In the case of *Lainson* v. *Lainson* (1) I had to consider this question, and many authorities were then cited, which, in my opinion, established that in a case where a previous life estate was revoked, the next estate in remainder was accelerated, and I think that this is so here, where the testator directs that the estate shall go as it would in the event of his widow's actual decease.

There is more difficulty and doubt as to what becomes of the appointed estate on the forfeiture of the life interest of the widow. As a general rule it may be stated, that in most of the cases of the failure of a particular estate appointed under a power, it has been held that the remainders have not been accelerated, but that the property has gone as in default of appointment. This, however, seems always to have been held on the principle that the testator had shewn no intention to accelerate the remainders. The subject is much discussed in a very learned judgment of Lord *St. Leonards*, in *Crozier* v. *Crozier* (2). In that case, lands had been conveyed to a testator for life, with

(1) 18 Beav. 1, 17 Jur. 172. (2) 3 D. & War. 353.

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an absolute and exclusive power of appointment, by deed or will, amongst his children, and, in default, amongst the children equally, as tenants in common; the testator, by his will, devised the lands to his wife for life, upon condition that she should maintain and educate the children; and, at her death, he devised the lands to the eldest son for life, with remainder to his heirs male and female; and further, the testator also, at the death of his wife, gave legacies of £500 each to his younger children, charged upon the estate devised; the Lord Chancellor held that the will operated as an appointment, that the appointment to the wife was bad, because she was not an object of the power, but that the appointment to the son was good, and also that the direction for maintenance and education of the younger children, and the gifts of the legacies to them charged on the property, were good executions *pro tanto* of the power; but that the estate of the son was not accelerated, and that, during the life of the widow, that part of the rents of the estate which was not required for the maintenance of the children and the payment of their legacies went, as in default of appointment, equally amongst the children. This decision, and more especially the observations of the Lord Chancellor in it, are very important, and seem to me to govern this case. The reason why the Lord Chancellor in that case held that the estate of the son was not accelerated was, because it was obvious from the dispositions in the will that the testator did not intend the appointment in favour of the son to take effect until after the death of the widow, and that, in the meantime, the younger children were to be benefited; but the Lord Chancellor expressly lays down that, when such intention appears, whether it be under a devise or an appointment, the remainder will be accelerated. The following passage (1) expresses very clearly his view, and also what I conceive to be the law on this subject:—

"Whether a man have the fee vested in him, or only a general power of appointment, his intention, expressed in his will, is equally to be executed. It matters not whether he appoints or devises, provided that he do not exceed his power. For example, suppose a man, having a general power of appointment, to *appoint* by will to a monk for life (as under the old law), remainder to *A.* in fee.

(1) 3 D. & War. 365.

No doubt the estate for life would be void, and the gift to *A.* be good. If the power be confined to particular objects, it cannot be exceeded, but, within its limits, the intention of the testator, the donee of the power, must be observed. In this case, therefore, let us suppose a similar *devise* to a monk for life, remainder to the eldest son of the testator in fee, the life interest would be void by the general law, and also as an appointment to a stranger; but there is no reason why a different rule should be applied to the gift of the remainder, from that which would apply to a devise not under a power. I assume that the power authorized a gift of a remainder in fee, and then the testator's disposition stands on the same footing with a similar one by a devisor seised in fee. There ought to be no trifling distinctions between power and property upon merely technical grounds." To apply these observations to the present case, it follows, that if the testator has expressed a clear intention, that if the appointment for his wife for life should cease by reason of any forfeiture, in that event the appointment in favour of the son should take effect at once, then the son's estate is accelerated; and I think that this testator has expressed such an intention, and that this is made clear by the words to which I have already referred when disposing of the case relative to the devised lands, whereby he makes the appointment to his son of these lands immediately on the decease of his wife; and, secondly, directs that the forfeiture which may take place shall determine her estate as effectually as by her actual decease. I think the two taken together make a clear expression of intention, that the appointment in favour of the son is to take place as soon as that in favour of the widow fails; and, consequently, the estate of the son is to be accelerated with respect to all the land which passes by this will. I will make a declaration to that effect accordingly.

Solicitors for the Plaintiffs: Messrs. *Norris & Allen.*
Solicitor for the Defendants: Mr. *Beck.*

M. R.
1867
March 11, 21.

BICKLEY *v.* BICKLEY.

Copyhold—Custom—"Descent"— 3 & 4 Will. 4, c. 106, s. 3.

Where the custom of a manor was stated in a presentment of the homage to be that copyholds for the first *descent* after a surrender descend to the eldest son, and, if no surrender, to the youngest son :—

Held, that the word "descent" was not used in its strict legal sense, but meant "a single step in the scale of genealogy."

Where, therefore, the last surrender had been made to *B. B.*, who devised to *J. L. B.*, his heir according to the custom of the manor, and *J. L. B.* died intestate, leaving two sons :—

Held, that the youngest son of *J. L. B.* was entitled to succeed him.

Whether the *Inheritance Act* (3 & 4 Will. 4, c. 106), s. 3, applies to the case of a devise to an heir who disclaims all interest under the will, and enters as heir of the testator, *quære*.

THIS suit was for the administration of the estate of *John Latty Bickley*, an intestate. A decree had been made, by which an inquiry was directed what real and copyhold estate the intestate was entitled to at the time of his death, and who was his heir-at-law, and his heir according to the custom of the manor of which such copyhold estate was held. In the prosecution of this inquiry it appeared that the intestate was entitled to certain valuable copyholds containing mines, held of the manor of *Sedgley*, in *Staffordshire*; and a question arose whether his eldest or his youngest son was his heir, according to the custom of the manor. This question was now brought before the Court, by way of adjourned summons, upon a statement of facts agreed to between the parties.

The custom of the manor was thus stated in a presentment of the homage made in the year 1661 :—

"We present that all the customary lands and tenements within the manor aforesaid, for the first descent only next after a surrender, descend to the eldest son, but no longer without a new surrender. And if there be no such surrender to carry it to the eldest son, then upon every decease all such customary lands and tenements, according to the custom of the manor aforesaid, are descendible, and by the said custom ought to descend, to the youngest son; and if no son, to the daughters as co-heirs; and if

no lawful issue (son or daughter) then to the youngest brother of the deceased party; and if no brother or sister, then to the youngest kinsman or kinswoman; and never to the eldest without a surrender, according to the custom of the said manor."

Another presentment was made to the like effect in 1780.

The title of *John Latty Bickley* to one of the copyholds in question, the decision as to which governed the others, was as follows:—

On the 26th of March, 1775, the copyholds were, on purchase, surrendered to the use of *John Bickley* and his heirs and assigns, according to the custom of the manor, and he was admitted tenant. On the same day, he and his wife surrendered to the use of *John Keeling* (a mortgagee), his heirs and assigns, and he was admitted tenant.

On the 27th of October, 1776, *John Bickley* died intestate; and on the 23rd of May, 1788, *Benjamin Bickley*, his eldest son, was admitted tenant, as heir of his father. On the same day, *Benjamin Bickley* surrendered to the use of himself during his life, and after his decease to the uses of his will, and in default to the use of his heirs; and seisin was granted to him to such uses.

Benjamin Bickley subsequently paid off the mortgage debt; and on the 4th of December, 1809, the persons in whom the mortgage had then become vested were admitted tenants; and they then surrendered to uses similar to those declared upon the surrender by *Benjamin Bickley*, on the 23rd of May, 1788. *Benjamin Bickley* was never admitted upon this surrender.

On the 15th of October, 1846, *Benjamin Bickley* died, having by his will devised his freehold and copyhold estates to his eldest son *John Latty Bickley*, the intestate. In order to avoid payment of the increased fine which would become payable on his admission as devisee, *John Latty Bickley* claimed to be entitled to be admitted as heir of his father. His right to be so admitted was denied by the lord; the dispute was not settled at the time of his death, and he was never admitted tenant. He died in November, 1862, leaving two sons him surviving.

Mr. *B. B. Rogers*, for the eldest son:—

First: The custom did not apply to the transmission to *John*

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Latty Bickley. At the time when this custom arose, copyholds could only be transmitted by surrender, or upon an intestacy. In order to devise them, it was necessary to surrender to the uses of the will; the devisee then took under the surrender. The custom applies only to cases of transmission upon an intestacy. Now, although as between *John Latty Bickley* and the lord, the former might have a claim to be admitted as heir of his father; yet, for the purposes of inheritance, he must be considered to have taken as devisee (3 & 4 Will. 4, c. 106, s. 3), and taking as devisee, he took by surrender: therefore the custom did not apply to the transmission to *John Latty Bickley*, and his eldest son is therefore entitled, this being the first descent after a surrender.

Secondly: But if it did apply, the eldest son is still entitled. *Benjamin Bickley* was admitted while the legal estate was outstanding in a mortgagee. That was a wrongful admission. Afterwards the mortgagee surrendered; but *Benjamin Bickley* was never admitted—he had merely a right of admittance. Now, a custom does not apply to a copyholder *in potentiâ* merely: *Payne* v. *Barker* (1), and therefore the heir-at-law takes.

Mr. *Southgate*, Q.C., and Mr. *Dunning*, for the youngest son:—

The last surrender was in December, 1809. The custom is that the next descent after a surrender should go to the eldest son. The next descent in this case was to *John Latty Bickley*, for the *Inheritance Act* was not intended to prevent a man from disclaiming: *Rex* v. *Wilson* (2); *Doe* v. *Smyth* (3). The custom must be construed strictly.

Payne v. *Barker* was commented upon in *Doe* v. *Clift* (4). The rule appears to be, that where a person who is not a copyholder at all, enters into a contract for the purchase of copyholds, and dies before being admitted, the common law prevails, and his heir is entitled; but the case is different where the purchaser is already a copyholder.

[They referred to *Roe* d. *Beebee* v. *Parker* (5), where the custom of the manor was established at law.]

(1) Orl. Bridg. 18.
(2) 10 B. & C. 80.
(3) 6 B. & C. 112.
(4) 12 Ad. & E. 566.
(5) 5 T. R. 26.

Mr. *Rogers*, in reply:—

The custom points to the next descent after a surrender. *John Latty Bickley* did not take by descent. He might have disclaimed the devise to him, if he had thought fit. He did not do so, in fact, though he chose to take possession as heir; and that being so, the 3rd section of the *Inheritance Act* applies, and for purposes of inheritance he must be treated as a devisee.

March 21. LORD ROMILLY, M.R.:—

This is a case of much singularity. The question to be determined is, whether the eldest or youngest son inherits the copyholds of which their father was possessed at the time of his death, and which he did not dispose of by will.

[His Lordship then stated the custom of the manor, and the facts of the case, and continued:—]

The last surrender was on the 4th of December, 1809; and the question is, whether there has been any intermediate descent from that time to the present, or whether, upon the death of *John Latty Bickley*, intestate, the first descent took place.

In 1809, when the surrender took place, *Benjamin Bickley* was in possession as tenant. On his death in 1846, was the succession of *John Latty Bickley* a descent within the meaning of the words of the custom? If not, his eldest son will take now; if it was, his youngest son will take.

It is argued with much force by Mr. *Rogers*, that *John Latty Bickley* took by devise, and not by descent, from his father, *Benjamin Bickley*, for that the Act 3 & 4 Will. 4, c. 106, provides that where an estate is devised in fee to the heir-at-law, the person taking the estate shall take it as devisee and not as heir. He admits that the cases of *Doe* v. *Smyth* (1), and *Rex* v. *Wilson* (2), are correct, and that you cannot force a devise upon a person who disclaims all interest under it; and he admits that the statute has not altered the law on this subject; but he contends, that if the person who is both devisee and heir of the estate does not disclaim the interest, but enters and enjoys the property, then

(1) 6 B. & C. 112. (2) 10 B. & C. 80.

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the statute enacts that his possession shall be ascribed to the devise, and not to the heirship. In answer to this, it is urged that the statute did not contemplate altering the rights of lords of manors and their copyholders; and that it would be monstrous in a case like this, where the fine on the admission of the heir is merely nominal, and the fine on the admission of the devisee unlimited, and consequently amounts to two years' improved value, which, in the case of mines, is a very large sum, to suppose that the Legislature intended to take away money from the copyholder and give it to the lord.

There is, however, a preliminary question, the decision of which is necessary before one can entertain the question whether the father of the applicants took as devisee or as heir; and that preliminary question is, whether the word "descent," which is used in the statement of the custom of the manor, means taking by inheritance or taking by succession.

Lawyers give a technical meaning to the word "descent." All estates are taken either by *purchase* or by *descent*. Unquestionably the strict legal sense of the word "descent" means taking an estate by inheritance: that is, as heir of the former holder; but in common parlance the word is not properly, nor indeed commonly, confined to that meaning, but means succession merely. Dr. *Johnson*, in his Dictionary, gives the five following meanings of the word "descent," which bear on the present subject, for all of which meanings he gives high authority from the best English writers, and in no one is the word confined to inheritance. First, the transmission of anything by succession and inheritance; second, the state of proceeding from an original or progenitor; third, birth, extraction, process of lineage; fourth, offspring, inheritors, those proceeding in a line of generation; fifth, a single step in the scale of genealogy or generation. For the last he gives the following quotation from *Hooker*: "No man living is a thousand descents removed from *Adam* himself;" and I think that this last meaning is the meaning which I must give the word "descent," as made use of in the statement of this custom: that it is not confined to the strict legal sense of the term, but is used in the ordinary popular meaning. There is also, by this means of interpreting the word, some uniformity given to the custom, which then amounts to

this: If a stranger buy the copyhold, and come in as a tenant of the manor, then his eldest son shall take; but if the tenant took the estate himself by inheritance from his father, then the youngest son of the tenant shall take the copyhold. If, in fact, the custom of borough English was founded on any suspicion or doubt as to the legitimacy of the eldest son, this would explain why the custom did not extend to the stranger who came in by purchase, and whose eldest son was probably born before he became a tenant of the manor.

Another thing which is to be taken into consideration is this: There is no statement here that there was any custom prevailing in this manor, allowing the tenant to devise his copyhold. If so, the custom must be anterior to the *Statute of Wills*, and must be construed, bearing in mind that at the time there was no mode by which copyholds could be transmitted from father to son, except by surrender or by inheritance. I think, however, that this leaves it where it was, because the expression "descent" applies to the transmission from father to son, by the only mode then known other than surrender; and if the statute gave another mode of transmission, it cannot be properly said that it had a special meaning as to that species of transmission which arises from inheritance, as distinguished from that which arises from devise.

I am also strongly confirmed in this view by the words of the custom which I have read, which uses the word "decease" as synonymous with "descent."

I am, therefore, of opinion that, according to the custom of the manor, this is the second descent from the last surrender, and that the youngest son is entitled.

Solicitors for the Eldest Son: Messrs. *Miller & Smith*, for Messrs. *Corser & Fowler, Wolverhampton.*

Solicitor for the Youngest Son: Mr. *T. W. Marchant.*

M. R.

1867

June 26;
July 1.

LLOYD *v.* BANKS.

Equitable Interest—Assignment—Notice to Trustee—Priority.

Upon an assignment of an interest in a trust fund, it is the duty of the assignee to give notice of the assignment to the trustee; and the only notice available in law is formal notice given by the person intending to claim the benefit of it, or by an agent on his behalf.

Where, therefore, a trustee became aware of the insolvency of his *cestui que trust* by reading in a newspaper an advertisement of a petition in the Insolvency Court, and he believed and acted on the information so acquired:—

Held, nevertheless, that a person who had taken a mortgage of the *cestui que trust's* interest, subsequently to the insolvency, was entitled to priority over the assignee in insolvency, by reason of his having been the first to give formal notice to the trustee.

BY an indenture, dated the 31st of December, 1852, being the settlement made in contemplation of the marriage of *Thomas Lloyd* and *Ann* his wife, it was agreed that certain trust funds specified in the schedule thereto should, subject to certain life interests then subsisting therein, be assigned to *James Davies* and *Richard William Banks* upon trust to invest the same as therein mentioned, and to pay the dividends and income thereof to *Ann Lloyd* during her life, for her separate use, and after her death to pay such dividends and income to, or permit the same to be received by, *Thomas Lloyd*, or his assigns, during his life, and after his death to stand possessed of the said trust funds and premises upon the trusts therein mentioned.

Ann Lloyd died on the 2nd of August, 1862.

In the year 1859, *Thomas Lloyd* took the benefit of the *Insolvent Debtors Act*. The vesting order in the insolvency was made on the 22nd of June in that year; and the insolvent received his order of discharge on the 22nd of April following.

In November, 1860, *Thomas Lloyd* mortgaged his life interest under the settlement to *Mark Shephard*. In March, 1861, *Shephard* gave notice of the mortgage to *Richard William Banks*, who had then become the surviving trustee of the settlement.

No formal notice of the insolvency was given by the assignee to the trustees of the settlement until February, 1864; but upon the cross-examination of Mr. *Banks* in this suit, he admitted that in

February, 1859, he had read in the *Hereford Journal* newspaper an advertisement, which was as follows: "Petition of an insolvent debtor, to be heard in the Court of *Francis Stack Murphy*, Esq., Commissioner, at the Court House, *Portugal Street, Lincoln's Inn Fields*, on the 14th day of March, 1859, at 10 o'clock in the morning;" then followed a description of *Thomas Lloyd*.

Mr. *Banks* was a solicitor, and acted in that capacity on behalf of *Thomas Lloyd's* father-in-law, in negotiations which took place in the year 1861 for the purchase of *Thomas Lloyd's* life interest under the settlement: and he appeared in such negotiations, and upon other occasions, to have dealt with *Thomas Lloyd* upon the footing of his being insolvent.

The suit was instituted for the administration of the trusts of the settlement: and the Chief Clerk found that under these circumstances the assignee in insolvency was entitled to *Thomas Lloyd's* life interest in priority to *Mark Shephard*. Mr. *Shephard* took out a summons to vary the certificate.

Mr. *Jessel*, Q.C., and Mr. *Kingdon*, for Mr. *Shephard*:—

First: The advertisement is simply notice of the petition, not of the insolvency. Under the old bankruptcy law it was held that notice of a docket was not notice of the bankruptcy: *Spratt* v. *Hobhouse* (1).

Secondly: The advertisement is not such notice of the insolvency as to give the assignee priority. At the time when Mr. *Banks* read the newspaper, the prior life interest under the settlement had not determined: and he was under no obligation to attend to anything he might read respecting *Thomas Lloyd*. But, further, it is essential that *notice* should be given; mere knowledge is not enough: *In re Barr's Trusts* (2); *Re Tichener* (3). The only case in which notice has been dispensed with is where a trustee has taken an active part in the preparation of the deed of which notice is required to be given: *Meux* v. *Bell* (4). Such notice is required to perfect the title of the assignee, and must come from him: *In re Atkinson's Trusts* (5); *Foster* v. *Cockerell* (6).

(1) 4 Bing. 173.
(2) 4 K. & J. 219.
(3) 35 Beav. 317.
(4) 1 Hare, 73.
(5) 2 D. M. & G. 140.
(6) 3 Cl. & F. 456: see p. 476.

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Mr. *Pearson*, Q.C., and Mr. *H. B. Miller*, for the assignee in insolvency :—

The advertisement is one of a petition which could not have been presented until a vesting order had been made in the insolvency: the person who read it was a professional man, and must be taken, after reading the advertisement, to have known that a vesting order had been made, and that the Petitioner was insolvent.

Again, Mr. *Banks* subsequently acted on the information he thus received, and knowing it for one purpose, he must be fixed with notice for every purpose: *Browne* v. *Savage* (1).

Formal notice is not necessary. An assignee may rely on notice casually given in the course of conversation: *Meux* v. *Bell* (2); *Smith* v. *Smith* (3). The latter case was approved in *Tibbits* v. *George* (4). The rule is, that if you can shew that a trustee had such knowledge of any transaction, that if he had been asked in the ordinary course of business as to the dealings of his *cestui que trust* with the trust property, he would have mentioned it, then the trustee must be deemed to have notice. That applies here, and entitles the assignee to priority.

Finally, Mr. *Shephard* has been guilty of laches: he made no inquiry of the trustee prior to lending his money, but contented himself with giving notice after he had lent it. If he had asked the question, Mr. *Banks* would, in all probability, have mentioned the insolvency. And although the assignee in insolvency has also been negligent, still he has priority in point of time, and his title must prevail.

Mr. *Jessel*, in reply :—

An assignee of an equitable interest must give notice in order to complete his title. The title depends, therefore, not on the trustee having notice, but on the assignee giving it. The assignee cannot rely on the knowledge of the trustee, or on information given to him by third parties, still less on information derived from a newspaper; the notice, though not necessarily in writing, must nevertheless be formal notice, given by the assignee or on

(1) 4 Drew. 635. 5 Jur. N.S. 1020 (3) 2 C. & M. 231.
(2) 1 Hare, 73. (4) 5 Ad. & E. 107; see p. 115.

his behalf: *Foster* v. *Cockerell* (1); *In re Atkinson's Trusts* (2). *Meux* v. *Bell* (3) is a good illustration of the same thing. There a bond was handed over to the trustee of a settlement, whose sole right to the bond was as such trustee, and it was held that the person delivering it up could not dispute that he had notice of the settlement.

It is laid down by Lord *St. Leonards* that a purchaser is not bound to attend to vague rumours — to statements by mere strangers; that a notice to be binding must proceed from some person interested in the property (4). The same rule applies here.

July 1. LORD ROMILLY, M.R., after stating the facts, continued:—

The question is, whether the fact of the trustee having seen the advertisement in the newspaper, and believed it to be true, constitutes notice of which the assignee in insolvency can take advantage. I am of opinion that it does not.

It is quite clear that the belief or disbelief of the trustee in the truth of the advertisement cannot affect the question: nor does it depend on whether the trustee recollects it or not. It is settled that notice by a stranger will not do. If a stranger comes up to a trustee and informs him that his *cestui que trust* has mortgaged the trust fund to *A. B.*, this is not sufficient notice to the trustee. How does notice in a newspaper differ from notice by a stranger?

Not only will notice by a stranger not do, but it has also been held in the case of insurance offices, that the notice must be given in the form established by the practice of the office: and that if notice be given in any other form the office is not bound. The notice must therefore be formal and regular notice given by the person who intends to take advantage of it, or by some one on his behalf. Every one is familiar with the case of *Burrowes* v. *Lock* (5), in which a trustee who stated to a purchaser that the trust fund was unincumbered, was held liable, although, in point of fact, he

(1) 3 Cl. & F. 456.
(2) 2 D. M. & G. 140.
(3) 1 Hare, 73.
(4) Sug. V. & P. 14th ed. p. 755.
(5) 10 Ves. 470.

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did not recollect the incumbrance, of which he had previously received notice from the incumbrancer. Could it be contended that if the trustee had only derived his information from a newspaper he could have been made liable? I think clearly not.

I am of opinion, therefore, that the only notice available in law is regular formal notice; and the certificate must be varied accordingly.

Solicitors: Mr. *Mark Shephard;* Messrs. *Walker & Twyford.*

M. R. 1867 June 17, 28.

In re NEW ZEALAND BANKING CORPORATION.

HICKIE & CO.'S CASE.

Bill of Exchange—Insolvency of Acceptor and Drawer—Deposit of Securities—Appropriation.

The principle established in *Ex parte Waring* (1), that securities held by a banker against his acceptances are available to the bill holders, if both acceptor and drawer are insolvent, does not apply where the acceptor or drawer is a joint stock company which has been ordered to be wound up, unless it be shewn that the company is actually insolvent.

Semble, the rule in *Ex parte Waring* does not apply where the acceptors are creditors of the drawers to an amount exceeding that due on the bills, at least if the acceptors have a general lien on securities deposited with them.

IN November, 1865, the *New Zealand Banking Corporation* accepted bills to the amount of £5000, drawn upon them by Messrs. *Hickie & Co.*, and payable six months after sight. These acceptances were given upon a verbal undertaking by Messrs. *Hickie & Co.* that they would pay the bills at maturity; and such payment was secured by a deposit with the bank of certain shares belonging to *Hickie & Co.* The bills were indorsed to the *Bank of Hindustan, China, and Japan;* they were subsequently renewed, and finally became due on the 16th of August, 1866, previously to which date the *New Zealand Banking Corporation* had suspended payment, and been ordered to be wound up under the *Companies Act*, 1862. At that time *Hickie & Co.* were themselves in pecu-

(1) 19 Ves. 345.

niary difficulties; and an arrangement was made with the holders of the bills by which *Hickie & Co.* agreed to pay the amount due thereon by monthly instalments of £100 each. Five such instalments were paid; but ultimately, in April, 1867, *Hickie & Co.* executed a trust deed for the benefit of their creditors, under the 192nd section of the *Bankruptcy Act*, 1861.

The official liquidator of the *New Zealand Banking Corporation* had, in February, 1867, sold part of the securities deposited by *Hickie & Co.* for £740, and had carried over that sum to the general account of the liquidation. This was an application by the official liquidator of the *Bank of Hindustan, China, and Japan* (which was also being wound up) that the proceeds of the sale might be applied in payment of the sum remaining due on the bills.

At the time when *Hickie & Co.* executed the trust deed they were indebted to the *New Zealand Banking Corporation* in a considerable sum beyond that which remained due on the bills.

Mr. *Lindley*, for the official liquidator of the *Bank of Hindustan, China, and Japan*:—

We rely on *Ex parte Waring* (1), in which Lord *Eldon* laid down the rule that the securities held by a banker against his acceptances are available to the bill holders, if both the acceptor and drawer have become bankrupt, not by virtue of any contract with the bill holders, but through the equity of the assignees of the drawers to have the securities so applied. This case was followed in *Powles* v. *Hargreaves* (2), which decided that the rule applied where the insolvency had not been judicially declared.

As the rule depends on equities between the drawer and acceptor of the bills, it is immaterial that the holder of the bills had not, at the time when he became possessed of them, any knowledge that securities had been deposited to meet the bills: *Ex parte Perfect* (3).

Mr. *Jessel*, Q.C., and Mr. *Wickens*, for the official liquidator of the *New Zealand Banking Corporation*:—

First: *Ex parte Waring* does not apply in a case such as the present, where the drawer's estate is largely indebted to the

(1) 19 Ves. 345. (2) 3 D, M. & G. 430. (3) Mont. 25.

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acceptors. In *Ex parte Waring* (1) the balance of the account was the other way: and Lord *Eldon* says (2) that if the drawers had paid the acceptors the amount due on the bills, the securities must have been restored to them. Here, if *Hickie & Co.* had paid all that was due on the bills, still we should have been entitled to retain these securities, by virtue of our general lien as bankers. The application of the rule would also here work very great injustice, for much more than £740 is due on the bills; and after that sum had been applied in payment of them, the *Bank of Hindustan* would still be at liberty to prove against us for the balance; and thus, in effect, we should be deprived of the benefit of our security. In *Powles* v. *Hargreaves* (3) the point did not arise; the acceptors were not bankers, and there was no agreement that the securities should be held to cover a general balance.

Secondly: The application comes too late; for the securities had been sold, and the proceeds of the sale applied to the general purposes of the liquidation long before this application was made.

Thirdly: A winding-up order is not an adjudication that the company is insolvent, it is simply a statutory substitute for a decree dissolving a partnership. In order, therefore, that the rule in *Ex parte Waring* may be applied, it must be shewn from the circumstances of the case that the company is insolvent. Here the company is not insolvent; in fact, one call of moderate amount will pay all the debts of the company.

Mr. *Lindley*, in reply:—

It is assumed on the other side that the *New Zealand Corporation*, as bankers, had a general lien on all securities deposited with them; but that is not so. Bankers have no general lien on securities deposited for a particular purpose: *Vanderzee* v. *Willis* (4); *Brandao* v. *Barnett* (5).

If, then, there is no general lien, the case is the same as *Powles* v. *Hargreaves*, and the argument, arising from the circumstance that the securities are insufficient to meet the bills, was there considered and answered by the Lord Chancellor (6).

(1) 19 Ves. 345.
(2) Ibid. 349.
(3) 3 D., M. & G. 430.
(4) 3 Bro. C. C. 21.
(5) 12 Cl. & F. 787.
(6) 3 D. M. & G. p. 452.

As to our being too late, the money is still in the hands of the official liquidator; we are not too late to stop it, and we say it ought to be applied in paying us.

Then it is said that there is no insolvency here. If so, I admit that *Ex parte Waring* (1) does not apply, and the whole controversy is idle, for we shall get paid in full some time or other. But though a winding-up order is not an adjudication of insolvency, neither is it a simple decree for dissolution; it is something between the two. Here it is admitted that the *New Zealand Bank* stopped payment, and a compulsory liquidation was necessary in some form or other. That is sufficient to bring the case within the principle of *Ex parte Waring*.

June 28. LORD ROMILLY, M.R., after stating the facts, continued:—

The *Hindustan Bank* claims that the sum of £740, which is the produce of the sale of the securities deposited with the *New Zealand Bank*, shall be applied in the first instance in payment of the bills held by them. This is contended for on the principle laid down by the Lord Chancellor in the case of *Ex parte Waring*.

The case of *Ex parte Waring* was this: *B. & Co.* had an account with their bankers, drawing bills upon them and depositing securities against their drafts. The bankers stopped payment in July; they were under acceptances for *B. & Co.* for £24,000, and there was in their hands also a cash balance in favour of *B. & Co.* exceeding £6700, and they had also in their hands short bills belonging to *B. & Co.* exceeding £21,600, and also the title deeds of premises in *London*, belonging to *B. & Co.*, worth about £3000. The result of the account, therefore, was, that when the acceptances were paid by the bankers, they held securities to meet them worth about £600 more than the acceptances amounted to, and the bankers would also, besides, owe *B. & Co.* the balance of their account, exceeding £6700. In August, as might have been expected from this statement, *B. & Co.* also became bankrupt. It was decided by Lord *Eldon* that the holders of the bills accepted

(1) 19 Ves. 345.

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HICKIE & Co.'s CASE.

by the banking company were entitled to have the produce of the securities deposited by *B. & Co.* specifically applied in payment of those bills, on the ground that the estate of the bankers must be cleared of the demand by their acceptances, and that the surplus of the produce of the securities, after answering the demand upon them, must be made good to *B. & Co.*, and that this equity could only be accomplished by paying to the bill holders the amount realized by the sale of the securities, to the extent of satisfying the amount due on the bills, or as far as such produce of the sale of the securities would extend.

The answer made by the Respondents to this application is, that the principle on which that case rested was, that the acceptors and holders of the securities were debtors on the whole account to the drawers of the bills who deposited the security; but that where the converse case arises, the same principle which entitled the holders of the bills to receive payment of the amount produced by the securities, negatives their right to do so, and that the present is such converse case. The principle, it is urged, is founded on the equity which exists between the two houses which have become insolvent. In *Ex parte Waring* (1) the acceptor and holder of the security was debtor to the drawer of the bill and depositor of the security; therefore, the drawer's estate in that case was entitled to be exonerated by paying to the bill holders the amount realized by the securities, as far as that would extend, in order that they might not seek payment against the drawers of the balance unpaid, the securities having been deposited upon the express contract that, as far as possible, these securities should exonerate the drawers, which would fail if the holders of the bills were allowed to take only a dividend on the estate of the acceptors and holders of the securities, and then proceed against the estate of the drawers and depositors for the balance. But in this case it is urged that the equity of the two houses is reversed; for that the *New Zealand Banking Corporation*, the acceptors and holders of the securities, were and are creditors to a large amount of *Hickie & Co.*, the drawers and depositors of the securities; and that, consequently, assuming the securities deposited produced more than sufficient to pay the bills accepted, still that, as bankers, the *New*

(1) 19 Ves. 345.

Zealand Banking Corporation had a general lien on these funds to secure payment, as far as they would extend, of the balance due to them from *Hickie & Co.*, and, consequently, as there could be nothing under any circumstances owing to *Hickie & Co.* after payment of the bills, they could have no right to compel the *New Zealand Banking Corporation* to apply the produce of the securities for one purpose rather than any other, and that, consequently, the produce realized by the sale of the securities would be general assets of the *New Zealand Banking Corporation*, and the holders of the bills accepted by the company must come in and prove like all other creditors.

In *Powles* v. *Hargreaves* (1), in which this doctrine was much considered, as I understand the case, the same circumstances occurred as in *Ex parte Waring* (2). *Prescott*, the acceptor of the bills, was insolvent: the return consignments were more than sufficient to pay his acceptances, and the question was, whether the return consignments were to be applied first, in payment of the holders of the bills, or whether they were only to receive a dividend with the other creditors of *Hargreaves & Co.* Accordingly, *Ex parte Waring* was followed, and, in truth, all that appears to me to be decided by that case, the facts of which are very intricate and involved, is, that provided the insolvency is real and actual, it need not be judicially established.

I am at present disposed to think that the distinction taken by counsel in this case is correct, and that it agrees with the observation of Lord *Eldon*, when he observes that if the bankers had not become bankrupt, there was nothing in the transaction which would entitle those who were creditors to maintain any equity against the bankers, by reason of the acceptance of the bills by the bankers who held the deposit. If, therefore, on taking the account between the bankers, the *New Zealand Corporation*, and the depositors, *Hickie & Co.*, the balance is against *Hickie & Co.*, and in favour of the *New Zealand Corporation*, it would appear to me, that the produce of the securities would be part of the assets of their firm, and distributable *pari passu* among all the creditors.

However, a second objection has been taken, which, in my opinion, disposes of the case, at least for the present, and makes

(1) 3 D. M. & G. 430. (2) 19 Ves. 345.

M. R. 1867 HICKIE & CO.'S CASE.

it unnecessary to consider the question whether the *New Zealand Banking Corporation* would have a general lien on the produce of the securities for payment of any balance that might be due to them from *Hickie & Co.*, or whether, if the produce of these securities should appear, as I understand to be the case, not sufficient to pay the amount due on the bills, the question as to bankers' general lien would arise at all.

It is said that a winding-up order is not a declaration by the Court of the insolvency of the concern which is wound up. This is, no doubt, true, and accordingly in several cases, not very numerous, the creditors have been paid in full all that is due to them. But *Powles* v. *Hargreaves* (1) determines, that the Court will not look to the technical declaration of insolvency, but to the actual fact of its existence, and if so, and if I have good reason to believe that this company is not insolvent, the question argued before me would not arise, and, indeed, as Mr. *Lindley* very justly said, it becomes wholly immaterial; for if his clients are paid in full, it is of no consequence to them whether they are paid out of one fund or out of another; and if the estate is solvent I do not think that one class of creditors can fairly claim payment out of a particular fund before the others, on the ground that if the estate had been insolvent it would have been so applicable. Now in the present case I am informed that this company is solvent, and that it will by the enforcement of one call pay all its creditors in full. I shall, therefore, direct this summons to stand over until the result of this has been ascertained; but in the meantime the sum of £740 must be ear-marked, and not dealt with without notice to the holder of the bills.

Solicitors for the *Bank of Hindustan:* Messrs. *Ashurst, Morris, & Co.*

Solicitors for the *New Zealand Banking Corporation:* Messrs. *Mackenzie, Treherne, & Trinder.*

(1) 3 D. M. & G. 430. 17 Jun 1867

In re TAVISTOCK IRONWORKS COMPANY.

LYSTER'S CASE.

M. R.
1867
July 1, 3.

Company—Winding-up—Contributory—Forfeiture of Shares—Power of Directors—Quorum—Register.

Where the articles of association of a company do not prescribe the number of directors required to constitute a quorum, the number who usually act in conducting the business of the company will constitute a quorum.

A forfeiture of shares by two out of six directors held valid.

Where shares have been forfeited by a valid resolution of directors, it is immaterial that the name of the owner has not been removed from the register of members.

THIS was an application by the official liquidator of the *Tavistock Ironworks Company, Limited,* that the name of Mr. *Robert Lyster* might be placed on the list of contributories of the company.

In May, 1864, 250 shares in the company, of £10 each, were allotted to Mr. *Lyster.* He had applied for these shares at the request of a Mr. *Bennett,* and, after the allotment, held them upon trust for him. *Bennett* paid a deposit of £3 per share upon the occasion of application being made for the shares, and also a call of £3 per share, made in 1864. In 1865 two further calls, each of £2 per share, were made, but were not paid; and in July, 1865, *Lyster* filed a bill to compel *Bennett* to accept a proper transfer of the shares to himself, to procure them to be registered in his own name, and to pay all calls thereon.

On the 18th of October, 1865, a resolution was passed by a board meeting, at which two directors only were present, that the shares in question be forfeited for non-payment of calls. This resolution was duly entered in the minutes, and was also communicated by the secretary of the company to *Lyster.* Notice of the forfeiture was entered in a book kept by the company, and called the "share ledger," but was not entered in another book called the "share register." The secretary of the company, however, stated that he considered the book called the "share register" to be quite unsuitable for use as the register required to be kept in

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accordance with sect. 25 of the *Companies Act*, 1862, and that he had used the "share ledger" for that purpose.

In November, 1865, a decree was made in accordance with the prayer of *Lyster's* bill. The articles of association required that all transfers of shares should be by deed executed by the transferor and transferee. In consequence of *Bennett* having gone abroad, it was not until September, 1866, that he could be got to execute a transfer of the shares in accordance with the decree. This transfer was taken to the office of the company for registration early in October, 1866, but the secretary declined to register it, on the ground that a Petition had been presented by the directors for winding up the company, and that he had been appointed provisional liquidator. An order for winding up the company was made in November, 1866.

No return was made by the company, in accordance with sect. 26 of the *Companies Act*, 1862, subsequently to the forfeiture of the shares.

The articles of association of the company provided that the number of directors should be determined from time to time by a general meeting, and that until any other number should be determined, there should not be less than three, nor more than nine, directors. There was no provision as to the number required to constitute a quorum. By the interpretation clause the word "directors" in the articles was defined to mean "the directors from time to time of the company;" and "board" was defined to mean "a meeting of the directors duly called and constituted, or (as the context may require) the directors assembled at a board meeting, or (as to the decision of any question, or the exercise or delegation of any power which the directors or board are by these presents, or under the statute, enabled to exercise or delegate) the majority present and voting at a board meeting according to the provision of these presents."

By clause 48 it was provided that after three months' non-payment of any call in respect of any share, "the board" might declare the share forfeited for the benefit of the company.

The following clauses were referred to in the course of the argument.

"116. Every question at a board or a committee shall be deter-

mined by a majority of the votes of the directors present thereat, every director having one vote.

"117. In case of an equality of votes at a board or committee, the acting chairman thereat shall have a second or casting vote.

"118. The board may from time to time, by resolution of the board, appoint, and remove, and delegate, any of the powers of the board to such committee, or committees, consisting of some one or more of the directors, as the board may think fit, and may, by resolution of the board, determine and regulate their quorum, duties, and procedure; and if their quorum and procedure shall not be so determined, the committees respectively may from time to time determine their own quorum and procedure."

"121. Minutes of the proceedings of every board and committee, and of the attendance of the directors at the meetings thereof respectively, shall, with all convenient speed thereafter, be recorded by the secretary in a book kept for the purpose, and be signed by the chairman thereat, or in case of his default or incapacity, by any two directors present thereat, and every such minute, when so recorded and signed, shall, in the absence of proof of error therein, be considered an original proceeding, and be receivable in evidence without further proof."

There were six directors throughout the transactions above mentioned. On no occasion were more than four present at a board meeting, and generally only two. Three were present at the meeting when the shares were allotted to *Lyster*.

Mr. *Southgate*, Q.C., and Mr. *Kekewich*, for the official liquidator:—

The forfeiture was invalid, by reason of only two directors being present at the meeting when it was made. No forfeiture made by less than a majority of the whole number of directors could be valid.

Further, *Lyster's* name has never been removed from the register of shareholders; and on this ground alone he is liable as a contributory.

Finally, *Lyster* acted as the owner of the shares subsequently to the forfeiture by sending a transfer of them to be registered, and he cannot now dispute his liability.

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Mr. *Baggallay*, Q.C., and Mr. *Archibald Smith*, for *Lyster*:—

If the shares have been actually forfeited, it is immaterial that the "share register" contains no notice of the fact: *Knight's Case* (1). In truth, however, the "share ledger" was the share register.

As to the validity of the forfeiture, we submit that on the true construction of the articles of association, two directors were enough to constitute a board meeting; as was held by Vice-Chancellor *Malins* in *Re Regent's Canal Iron Company* (2); but if no number less than the whole, or a majority of the directors, could act as a board, the original allotment was invalid, and *Lyster* never was a shareholder.

The transfer was only sent for registration in pursuance of the decree of the Court, and the rights of the parties cannot be affected thereby.

Mr. *Southgate*, in reply:—

Knight's Case does not apply. In that case the forfeiture was entered on the register: here it is not.

It is impossible that *Lyster* can be heard to say that he was not a shareholder in September, 1866, the date of the transfer: *Ex parte Briggs* (3).

At least a majority of the directors was required to constitute a board: *Brown* v. *Andrew* (4); *Kirk* v. *Bell* (5). As to the allotment being invalid, *Lyster* has paid the calls on the shares, and cannot now allege that they were not duly allotted.

July 3. LORD ROMILLY, M.R.:—

Upon examining this case I think it is impossible to distinguish it from *Knight's Case*. I think there was a clear forfeiture of the shares, and that the mere fact of not erasing the name of *Lyster* from the list of shareholders when everything else had been done that was necessary for the purpose of making him cease to be a shareholder does not affect the question.

(1) Law Rep. 2 Ch. 321.
(2) Feb. 21, 1867.
(3) Law Rep. 1 Eq. 483.
(4) 13 Jur. 938.
(5) 16 Q. B. 290.

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I have considered very carefully the question whether two directors were a sufficient quorum for the purpose of forfeiting the shares. The total number of directors was six. The largest number who attended was four, and the usual number who attended was two, that is to say a third of the directors, and most of the acts were done by that number of directors. Then I find that though the articles of association specify certain cases in which a committee may form a quorum, they nowhere specify what number shall form a quorum of directors. It is suggested that, in the absence of any stipulation to that effect, it requires the total number to be present. But I do not think that follows; I think that what does follow is this, that it is the duty of the Court to find out what was the usual number of directors who conducted the business of the company. I find the usual number was two; and that being so, in order to prove that the forfeiture was invalid, it is necessary to establish that it was a wrong and improper exercise of their functions. I am of opinion that this has not been proved, and that, in fact, the directors have done nothing which can prevent *Lyster* from claiming the benefit of being erased from the list of shareholders.

Then it has to be considered whether the acts which *Lyster* has subsequently done have fixed him on the list. For that purpose it is necessary to refer to the fact that he bought the shares at the instance and for the benefit of another person of the name of *Bennett*. Of course if *Lyster's* name still remained on the list of shareholders he would still be liable, and he could only go against *Bennett* for indemnity. But in July, 1865, he filed his bill against *Bennett* to make effectual the indemnity to which he was entitled as trustee for him. In September he gave his notice of motion, and in October his shares were forfeited. After that I do not think there is any act of his that can be construed to be acquiescence. His continuing the suit till the November following, his then obtaining a decree against *Bennett*, his unsuccessful efforts to make that decree effectual, which he was unable to do till nearly a year afterwards, do not constitute any acquiescence on his part to remain a member of the company.

The material fact against him is that which I began with, and which I conclude with, viz., that his name does appear on the

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list of members of the company. I understand that no return was made to the Registrar of Joint Stock Companies in *London*, after the forfeiture had taken place, but all the other acts of forfeiture are complete. There is the due entry of it in the minutes of the directors; and there is the due entry of it in the ledger of shares; the only thing against this is, that his name is not erased from the list of members. I think, having regard to all the former circumstances, that this is not sufficient to keep him on the list of contributories.

Solicitor for the Official Liquidator: Mr. *Reep*.
Solicitors for Mr. *Lyster*: Messrs. *Boys & Tweedies*.

M. R. 1867 *March* 22; *April* 26.

In re SOUTH BLACKPOOL HOTEL COMPANY.

MIGOTTI'S CASE.

Company—Contributory—Subscriber of Memorandum—Allotment—Companies Act, 1862 *s.* 23.

The subscribers of the memorandum of association of a company under the *Companies Act*, 1862, are, by the 23rd section of the Act, bound to take as many shares as they have subscribed for, whether or not the shares are actually allotted to them, and this obligation is not satisfied by the allotment at a subsequent period of nominally fully paid-up shares.

Therefore, where *M.* subscribed the memorandum of a company for five shares, and eight months afterwards five fully paid-up shares, which the company had agreed to allot to *C.* as part of the purchase-money for property sold to them by *C.*, were by *C.*'s direction allotted to *M.*, and the company was wound up:—

Held, that *M.* was a contributory in respect of five shares upon which nothing had been paid.

THIS was an application by the official liquidator of the *South Blackpool Hotel Company, Limited*, that *Alphonzo Migotti* might be ordered to pay £25, being the balance alleged to be due from him as a contributory.

The company was formed under the *Companies Act*, 1862, in April, 1863, with a nominal capital of £50,000, in 10,000 shares of £5 each; and on the 9th of April, 1863, *Migotti* signed the memorandum of association as a subscriber for five shares.

The company having agreed to purchase certain lands from *Thomas Carter*, the promoter of the company, for £4750, of which £2,500 was to be paid in 500 shares in the company, to be taken as fully paid-up shares, and to be allotted to *Carter*, or to such persons as he should direct, on the 19th of January, 1864, *Carter* wrote a letter to the secretary of the company directing him to allot to *Migotti* five of his shares, and to several other subscribers of the memorandum a number of his shares corresponding to the number of shares for which they had respectively subscribed. On the 21st of January, 1864, the secretary allotted to each of the persons named in the letter the number of fully paid-up shares which he was thereby directed to allot to them.

No other shares were ever allotted to *Migotti*, or the other subscribers of the memorandum of association.

In 1865, the company was ordered to be wound up, and all the subscribers of the memorandum were settled on the list of contributories in respect of the number of shares for which they had subscribed. A call for the full amount of the shares had been made, but the subscribers of the memorandum contended that as they held as many shares as they had subscribed for, and those shares were fully paid up, they were under no further liability.

The Chief Clerk being of opinion that they were liable to pay the call, the application was adjourned into Court, and it was agreed that *Migotti's* case should be selected, as a specimen case, to try the question.

Mr. *Herbert Smith*, for the official liquidator:—

By the 23rd section of the *Companies Act*, 1862, the subscribers of the memorandum of association of a company formed under that Act are bound to take the number of shares for which they subscribe: *Evans's Case* (1); and that obligation is not removed by the allotment to them of the same number of nominally fully paid-up shares, especially when such allotment takes place long after the registration of the company.

The Respondent, *Migotti*, in person:—

By subscribing the memorandum I agreed to take five shares,

(1) Law Rep. 2 Ch. 427.

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and five shares have been allotted to me. It is true that those are paid-up shares, but there is nothing in the memorandum, or in the Act, which prevents a subscriber from receiving the shares for which he has subscribed, as fully paid up. Although no money has been paid upon the shares allotted to me, they represent money's worth, viz., the land which the company purchased by means of them. I have never been registered as the holder of any other shares. In *Evans's Case* (1), no shares had been allotted to *Evans*, and it was his duty, as director, to have allotted to himself the shares for which he had subscribed.

April 26. LORD ROMILLY, M.R.:—

In this case the question is, whether Mr. *Migotti* is a contributory of the company in respect of five shares in the company on which nothing has been paid. The question is one of importance, because it affects the case of several other persons, who are in exactly the same position as Mr. *Migotti*. The facts are extremely few, and the question, however important, lies in the smallest possible compass.

On the 9th of April, 1863, Mr. *Migotti* signed the memorandum of association for five shares in the company. In *Evans's Case* (2), I held that the 23rd section of the *Companies Act*, 1862, obliged the person who signed the memorandum of association to take the number of shares in respect of which he had so signed, and that this obligation could not be dispensed with by the directors. I accordingly held, on the construction of that section, that when a person had signed the memorandum of association for a specified number of shares, and the directors of the company had subsequently dispensed with the necessity of his taking the shares in respect of which he had signed the memorandum of association, and had substituted another person for him, that such dispensation was inoperative, that the directors had no power of doing so. I considered that he was bound to take the shares in respect of which he had signed, and do what was necessary to constitute him a shareholder in respect of such shares, and though he might afterwards sell and dispose of such shares as he thought fit, he could not

(1) Law Rep. 2 Ch. 427. (2) Law Rep. 2 Ch. 428, n. (1). 2 W.R. 51

refuse to take them in the first instance. That was my opinion on the construction of this clause in the statute. I considered that one object of it was, that the public might not be misled as to the names and character of the persons who had founded the company, and had agreed to become shareholders. My decision in that case was affirmed by the Lords Justices (1), and I am therefore confirmed in my opinion that I took a right view of the construction of this clause in the statute.

The question which affects the persons who have signed the memorandum of association in this case, of whom Mr. *Migotti* has been selected as an example, is this:—whether a transfer or an allotment of paid-up shares into the name of the persons who signed the memorandum of association eight months after signing the memorandum will satisfy this obligation imposed by the 23rd section of the statute.

On the 9th of April, 1863, Mr. *Migotti* signed the memorandum of association for five shares of £5 each. On the 20th of January, 1864, five paid-up shares were allotted to Mr. *Migotti* by the directors. The way in which that was effected was this:—the company was really got up by Mr. *Carter*, who was desirous to found this hotel company, in order that the company might purchase from him certain land and erect a hotel upon it. This land was to be paid for partly in paid-up shares of the company. On the 19th of January, 1864, Mr. *Carter* wrote a letter to the company, in which he directed, amongst other things, five of these paid-up shares to be allotted to Mr. *Migotti*, and also ninety-five more of the same paid-up shares to the other persons who had signed the memorandum of association.

The directors, on the 21st of January, 1864, acted upon the letter and allotted the shares accordingly. The question is, whether this allotment satisfies the obligation imposed by the 23rd section of the statute, or whether, notwithstanding such allotment, the gentlemen who signed the memorandum of association have not, by the statute, agreed to become holders of the number of shares set against their names in addition to and as distinguished from the shares so allotted to them, and whether they can repudiate their obligation to take such shares. And my opinion is, that they

(1) Law Rep. 2 Ch. 427.

M. R. 1867 MIGOTTI'S CASE.

cannot, and that they must be put on the list as contributories for the shares in respect of which they have severally and respectively signed the memorandum of association.

It is solely a question upon the construction of the statute,—what is the true meaning of the 23rd section? and by it I am of opinion that upon signing the memorandum of association for five shares, Mr. *Migotti* became a shareholder in the company for five shares; that he became, and must be held to have been, a shareholder for these five shares during the months of May, June, July, August, September, October, November, and December, 1863, and that if the company had been wound up during those months, he must have been placed on the list of contributories in respect of these five shares; and further, that when, at the request of Mr. *Carter*, five shares were allotted to Mr. *Migotti*, on the 21st of January, 1865, these must be considered to have been five additional shares, and that such allotment did not release Mr. *Migotti* from the agreement which, by the terms of the statute, he had entered into to take five shares when he signed the memorandum of association, and that it did not satisfy or perform that agreement. It is true that these five shares, which he so contracted to take by signing the memorandum of association, are not entered in any book of the company. It is true that Mr. *Migotti* has not signed the articles of association for any shares except the five paid-up shares allotted to him by the direction of Mr. *Carter;* but if he was bound by his agreement to take the five shares, he does not escape from the obligation imposed on him by non-compliance with the regulations of the statute. Mr. *Migotti*, in his last affidavit, has endeavoured to meet this point, and he seems to think that he had the power of refusing to take these shares, but I am of opinion that he had no such power. He had unquestionably the power to take the allotment of shares made to him in January, 1864, but he had not the power to substitute the five shares so allotted to him for the five shares which he agreed to take in April, 1863, which, by signing the memorandum of association, he became bound to take, and in respect of which he must be deemed to have been a shareholder during the eight months which preceded the month of January, 1864.

It is, in my opinion, obvious that a contrary decision would

defeat the object of the statute. If an allotment of paid-up shares eight months after the formation of the company would satisfy this statutory condition, why would not such an allotment at any later period be equally effectual? and if so, it might be made some years afterwards, and even in contemplation of the winding up of the company. In this case, for eight months, the public, who were invited to take shares, had, from the publication of the memorandum of association, been induced to believe that seven respectable and responsible gentlemen had amongst them agreed to take a certain number of shares in the company of £5 each, and that consequently there was so much capital belonging to the company available for the purposes of the company. On the faith of that belief persons subscribed for shares and became members of the company, and some months afterwards it turns out that not a penny of this money is forthcoming, and that all that really has occurred is, that another gentleman, who is the real originator and founder of the company, has directed that certain paid-up shares, to which he is entitled in respect of the land to be sold to the company, are to be allotted to these seven gentlemen. I am of opinion that this is not the true construction of the statute, and that the Chief Clerk was right when he put Mr. *Migotti* on the list of contributories for five shares. As this is a specimen case to try the right, I shall give no costs against the Respondent. The official liquidator must have his costs out of the estate.

Solicitors for the Official Liquidator: Messrs. *Gold & Son.*

M.R.
1867
June 29;
July 1, 2.

In re ROYAL HOTEL COMPANY OF GREAT YARMOUTH.

Company—Winding-up—Delinquent Director—Companies Act, 1862, *s.* 165.

4 Ch 482-5-7

Under sect. 165 of the *Companies Act*, 1862, no order will be made to compel a director or officer of a company to refund any moneys he has misapplied or retained, unless the case against such director or officer be clearly and distinctly made out, and there is no question of law to be determined.

THE *Royal Hotel Company of Great Yarmouth, Limited*, was incorporated in February, 1865, with a capital of £25,000, divided into 2500 shares of £10 each.

Clause 4 of the articles of association was as follows: "So soon as three-fifths of the nominal capital of the company shall have been applied for, and the requisite deposits paid thereon, the directors shall allot the shares of the company, and they may require payment for the same at such times and manner as in their discretion they may deem expedient."

Clause 67 provided that the first directors should be determined by the subscribers of the memorandum of association, or the majority of them; and clause 70 provided that the qualification of each director so appointed should be the holding of at least ten shares in the company.

Clause 73. "In their management of the business of the company, the directors, without any further power or authority from the shareholders, shall and may do the following things, viz:—

(*a.*) They may commence and prosecute the objects of the company notwithstanding the whole capital of the company may not be subscribed for or taken.

(*b.*) They shall, within one month from the day of allotment, pay to Messrs. *Howes & Co.* of No. 58, *Old Broad Street, London*, the sum of £2500 as a remuneration for their labour and expense in and about the formation, constitution, and advertising the company, inclusive of the payments following; that is to say, all costs, charges, and expenses whatsoever, including solicitors' and brokers' charges, whether preliminary or otherwise, in or about the prepara-

(1) Re Ince Re Mercantile Trading Co, Shingen's Case 4 Ch 475-480.

tion and registering the memorandum and articles of association of this company."

The promoter of the company was *Frederick William Howes*, the sole member of the above-named firm of Messrs. *Howes & Co.*, and he and six other persons signed the memorandum of association.

On the 15th of March, 1865, *Howes*, and four others of the subscribers to the memorandum, passed a resolution appointing Sir *Edmund Lacon*, *James Goodson*, *William Jesse*, *James Packe*, and *John Evan Tibbs*, directors of the company. On the same day three of these gentlemen met, and, acting upon a representation by *Howes* that 1423 shares had been, or would be, applied for, they proceeded to allot 583 shares in the company to thirty-three persons, who were at that time the only persons who had actually sent in applications for shares. It was alleged that 200 of the shares so allotted were allotted to persons who had been induced to make their applications by *Howes*, and were represented by him to be responsible persons; whereas, in reality, some were insolvent, others were under incapacity, and others could not be found.

Subsequently, applications for 599 shares were received, and allotments made in respect thereof; so that, in the whole, 1182 shares were allotted.

Various sums, amounting in the whole to £2000, were from time to time paid to *Howes* by the directors out of the funds of the company, on account of the sum of £2500 payable to him under the 73rd clause of the articles of association.

The directors did not, on the 15th of March, or for two months afterwards, hold any shares in the company; but subsequently ten fully paid-up shares were allotted to each of them; and these shares were paid for (as was alleged) by *Howes* out of the moneys received by him from the company.

In 1866 the company was ordered to be wound up, and an application was now made under the 165th section of the *Companies Act* that the directors and *Howes* might be ordered to pay into Court the sum of £2000, so paid out of the funds of the company; or that they might be ordered to contribute to the

M. R. 1867 *In re* Royal Hotel Company of Great Yarmouth.

assets of the company such sums in respect of the payments made by them to *Howes* as the Court might consider just.

Sir *E. Lacon*, and Messrs. *Gordon*, *Jesse*, *Packe*, and *Howes*, had been examined by the official liquidator with respect to the affairs of the company under sect. 115 of the *Companies Act*; and the official liquidator gave notice of his intention to read their depositions in support of his application.

Howes, in his deposition, admitted most of the allegations made against him; and, in particular, that he had paid for the shares allotted to the directors out of the moneys paid to him on account of the £2500. The four directors who were examined admitted that their shares had been paid for by *Howes*, but denied all knowledge of the source from which *Howes* had obtained the money with which he paid for them. They admitted that sums had been paid to *Howes* on account of the £2500.

Mr. *Baggallay*, Q.C., and Mr. *Fooks*, in support of the application:—

We do not charge the directors with any fraudulent intention, but they were mere tools in the hands of *Howes*, who paid for their shares. They trusted to him and have been deceived by him, and must take the consequences. There is a necessary implication in the articles that the £2500 should not be paid to *Howes* until three-fifths of the capital had been subscribed for; that amount has never been subscribed for. Yet the directors paid *Howes*, and they ought to make good the amount. The case is still stronger as regards the £500 which *Howes* applied in paying for the shares held by them.

Mr. *Southgate*, Q.C., and Mr. *A. E. Miller*, for Sir *E. Lacon*, and Messrs. *Goodson*, *Jesse*, and *Packe*:—

These gentlemen are sought to be made liable, not for money which they have themselves taken out of the funds of the company, and applied to their own use, but for sums which they have paid in pursuance of the articles of association, and in the exercise of their discretion as directors of the company. There is nothing in the articles of association to prevent the directors from commencing business whenever they please; all that is provided

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for by the 4th clause is, that so soon as three-fifths of the capital are subscribed for, an allotment must be made.

Again, it is said that *Howes* bribed them by paying for their shares; but that is not so clear that it can be decided on an interlocutory application.

The 165th section of the *Companies Act* was never intended to apply to such a case as this. In *Re Bank of Gibraltar and Malta* (1) it was laid down that that section could only be applied in clear cases. This is not a clear case; there are serious questions of law to be argued; the issues ought to be fairly raised by pleadings, and then we should be prepared to meet them. In this particular case, there would be gross injustice in making an order upon the present summons. No issue has been raised which we can meet. The official liquidator simply takes out a summons, and gives us notice to read in support of it the examinations of all these gentlemen as to all their dealings with the company, and leaves us to gather from these the case he intends to make.

Further, it is submitted that these examinations are not evidence at all; they are merely information given to the official liquidator with respect to the affairs of the company. A director is not entitled to be present at the examination of his co-director, or to cross-examine him; how, then, can the statement of one director be used against another?

If it should be argued that the statement of a director is admissible against himself, still the case cannot be put higher than if the official liquidator had filed a bill, and the statement relied on had been an admission in an answer. Now, to entitle a Plaintiff to call upon a Defendant to pay money into Court, the answer of that Defendant must contain a clear admission of his liability: *Hagell* v. *Currie* (2). None of the directors have made any admission here, and on this ground alone the summons ought to be dismissed.

Mr. *T. A. Roberts*, for Mr. *Tibbs*, submitted that no case whatever had been made out against his client, inasmuch as he had not been examined at all under the 115th section.

(1) 34 Beav. 556; Law Rep. 1 Ch. 69. (2) Law Rep. 2 Ch. 449.

M. R. 1867 *In re* Royal Hotel Company of Great Yarmouth.

Mr. *Baggallay*, in reply:—

The other side does not rely on the merits of the case, but merely on a technical objection. If the 165th section does not reach this case it is wholly useless. This is quite different from the case of the *Gibraltar and Malta Bank* (1). All that was decided there was, that the Act could not be used for the purpose of initiating an inquiry into the acts of the directors with the view of taking ulterior proceedings. Here, everything we require has been proved in the course of the winding-up; and the directors have had notice that this evidence will be used against them. They have also had notice of the purpose for which the evidence is to be used; the summons specifies all the payments to *Howes* for which it is sought to make them liable.

July 2. Lord Romilly M.R.:—

In this case I am of opinion the Court cannot interfere under the 165th section. It is much too dangerous to attempt to proceed under that section in such cases as this. This is really a case for suit. There are many questions to be tried, and it is proper that the case insisted on should be made by pleading, and met by answer on the other side.

I do not think that the 165th section is altogether void of application. If it appears that a person has got money clearly belonging to the company, and which ought not to have been taken by him, as if, for instance, he has drawn a cheque, or obtained a cheque for the company to be paid to him, and if he has retained that money in his own hands, and, when called upon, gives no excuse in the matter, I do not mean to say that this Court would not order him to pay the money to the official liquidator. But where there is really a question to be tried, then I do not think this 165th section enables you to dispose of it in this way. Observe what the course is; certain witnesses are examined without the person against whom they are examined being present, or knowing anything at all about it. Suddenly he is informed that a great deal of evidence has been taken against him upon a parti-

4 Ch 485.

(1) 34 Beav. 556; Law Rep. 1 Ch. 69, 11 Jur N S 916

cular point. He is either examined or he is not. Then it is said, "Under this 165th section we have made a case to call upon you to pay a certain sum of money into Court, and what have you to say in answer to that?" Thereupon he is very much at a loss how to proceed. He has had no opportunity of cross-examining the witnesses at the time, and I do not know whether he can afterwards obtain an order to cross-examine them or not. If he calls them as his own witnesses, of course he calls witnesses hostile to himself, and he only makes the matter worse, and he would not in that case be at liberty to cross-examine them. Then it is said that he may meet the story on the other side by bringing up other witnesses. If he does, the official liquidator could cross-examine these, and the result is that there is no equality in the matter. If the matter is quite plain and clear, the Court proceeds on the 165th section, and says to this person, "Upon your own story, taking it exactly as it there stands, there is a case against you, and you must pay the money into Court." I cannot say that the case against Sir *Edmund Lacon*, Mr. *Goodson*, Mr. *Jesse*, Mr. *Packe*, or against Mr. *Tibbs*, is a case of that description. Mr. *Howes* does not appear. The case points strongly against him; but even against him the case is not, by any means, clear.

I adopt the same view of this section of the Act that I did in the case of the *Gibraltar and Malta Bank* (1). In fact, it is a matter of discretion in these cases, and the Court must judge for itself whether, in these cases, it can properly bring the matter within this section. It can only do so in plain and straightforward cases, where there is no point of law to be determined.

4 Ch 486

The official liquidator will have his costs out of the estate, and will be at liberty to file a bill against these persons; and, beyond that, there will be no order on this summons.

Solicitors: Messrs. *Wilson, Bristows, & Carpmael;* Mr. *Wilson;* Mr. *Algernon Sidney.*

(1) 34 Beav. 556.

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July 9, 10.

In re HEREFORDSHIRE BANKING COMPANY.

Winding-up—Companies Act, 1862, *ss.* 102, 170—*Debt—Interest—Order of November*, 1862, *Rule* 26.

Where a company is wound up under the *Companies Act*, 1862, and calls have been made on the shareholders, interest after the date of the winding-up can be paid out of the calls only on those debts which carry interest at law.

Interest was not allowed on the notes of a banking company where the notes were payable on demand, and no demand for payment had been made before the company was ordered to be wound up.

The 26th rule of the Order of November, 1862, is *ultrà vires* and invalid.

THE *Herefordshire Banking Company* was established in 1836, under the provisions of the Act 7 Geo. 4, c. 46. On the 18th of July, 1863, it was ordered to be wound up under the *Companies Act*, 1862.

The assets of the bank proved insufficient to meet the liabilities, and two calls were made on the shareholders. A sum of upwards of £8000, which had arisen from the calls, was now divisible amongst the creditors, and the official liquidator proposed to pay a dividend on the debts of the several creditors, together with interest thereon at the rate of 4 per cent. from the 18th of July, 1863. The question was, whether any, and what, rate of interest was to be allowed on the debts, a large portion of which were due on the notes of the bank. These notes were made payable on demand at the office of the bank, or at the *London and Westminster Bank, London.*

Mr. *Swanston*, for the official liquidator, submitted the question to the Court, referring to the 26th rule of the Order of the 11th of November, 1862. Some doubt had been thrown on the validity of this order by Lord *Westbury*, in *Re Hatfield Patent Cask Company* (1). His Lordship had in other cases held Orders of the Court to be *ultrà vires*: *Cookney* v. *Anderson* (2); but his opinion had since been overruled: *Drummond* v. *Drummond* (3).

(1) 2 N. R. 502; 11 W. R. 971. (2) 1 D. J. & S. 365. (3) Law Rep. 2 Ch. 32.

Mr. *Jessel*, Q.C., and Mr. *A. E. Miller*, for the shareholders of the company :—

We rely on the case of the *Hatfield Patent Cask Company* (1), which is exactly in point. If any of the debts carry interest at law, then we admit that the funds in the hands of the official liquidators are applicable to pay such interest; but if the debts do not carry interest at law, then the funds are not so applicable. The present fund arises from a call. Calls can only be made for payment of the debts and liabilities of the company: *Companies Act*, 1862, s. 102. Therefore this fund is not applicable in payment of anything but debts or liabilities. Interest is not a debt or liability in any case except where there is an express contract for payment of it, or where judgment has been recovered, or a demand has been made (3 & 4 Will. 4, c. 42; 1 & 2 Vict. c. 110, s. 17).

The 26th rule is clearly *ultrà vires*. It was made under sect. 170 of the Act of 1862, which only enables the Court to make rules for regulating the proceeding in the winding up of companies. This rule alters the rights of parties. The case is very different from *Cookney* v. *Anderson* (2). Lord *Westbury's* opinion in that case was overruled on the ground that the order which he considered invalid had since been sanctioned by the Legislature, and acquired the force of an Act of Parliament.

It is true that in administration suits the Court gives interest from the date of the decree, but the reason is, that the decree is for the benefit of all the creditors, who are thereby made judgment creditors of the estate. An order for winding up is very different, being in the nature of a decree for the dissolution of a partnership.

The MASTER OF THE ROLLS :—It is quite clear that where there is an express contract the debts will carry interest according to the contract.

Mr. *Baggallay*, Q.C., and Mr. *Winterbotham*, for the *Gloucestershire Banking Company*, who were the holders of a large number of notes of the bank :—

If the 26th rule is valid, interest is payable. It was signed by

(1) 2 N. R. 502; 11 W. R. 971. (2) 1 D. J. & S. 365.

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Lord *Westbury*, and has never been cancelled, and it binds the Court so long as it remains.

The notes are payable on demand. The stoppage of the bank is equivalent to a demand, for it is decided that where a demand cannot be made, the case is the same as if a demand were made: *Howe* v. *Bowes* (1); *Bowes* v. *Howe* (2); *Turner* v. *Stones* (3). "It cannot be necessary for the holders of the notes of a bank which has stopped payment, and is shut up, to go through the empty form of carrying their notes up to the bank doors, and then carrying them home again:" *Byles* on Bills (4). Interest, therefore, would be given on these notes at law: *Lowndes* v. *Collens* (5); *Blaney* v. *Hendricks* (6). It is, therefore, payable in the winding-up: *In re State Fire Insurance Company* (7).

The case of the *Hatfield Patent Cask Company* (8) was under the Act of 1856, and is distinguishable. That Act provided that "debts" only, and not "debts and liabilities," should be paid out of calls.

We sent in a claim for interest to the official liquidator, and, at any rate, we are entitled to interest from the date of that claim.

July 10. Lord Romilly, M.R.:—

I entertain no doubt about this case. It is impossible to get over the judgment of Lord *Westbury*, which is very strongly and well put. The distinction which was pointed out to me yesterday is very clear, namely, that though in the administration of assets the Court does allow, by its own authority, interest at £4 per cent. from the date of the decree, it is because the decree is a judgment in equity in favour of all the creditors, and prevents them from getting a judgment at law which would give them interest. But though a winding-up order is a decree in equity, and therefore a judgment, it is a judgment and decree of a different character. It is in point of fact a decree amongst a great number of co-partners to settle

(1) 16 East, 112.
(2) 5 Taunt. 30.
(3) 1 Dowl. & L. 122.
(4) 8th Ed. p. 187.
(5) 17 Ves. 27.
(6) 2 W. Bl. 761.
(7) 2 H. & M. 722; 9 Jur. N. S. 298
(8) 2 N. R. 502; 11 W. R. 971. 9 Jur. N. S. 297; 32 L. J. 603.

their equities among themselves, and to wind up the affairs of the partnership, but that does not give the creditors of the partners a judgment against the company, or entitle them to any interest in respect of it. Therefore, though I was a party to that Order of November, 1862, I cannot say that the Lord Chancellor's remark, that it was *ultrà vires*, is unfounded, and consequently I must follow his decision respecting it implicitly.

The case of *Cookney* v. *Anderson* (1), which was cited to me, was very different, and does not apply to the present case.

That being so, and the Order not being now conclusive upon the subject, the only question is whether at common law, when a banking company stops payment, you are entitled to claim interest according to the legal rate on the notes of the bank from the moment that it closes its doors, without making any demand for payment. I am of opinion you are not, and that you must present them in some way before interest can begin to run. It is quite clear that in the case of a bill of exchange you must do something equivalent to making a claim before you are entitled to any interest upon it. I am of opinion you must also do so in the case of a promissory note. These are notes payable on demand, and therefore you must demand payment of them. It is not necessary to go into those questions in which there is a good deal of intricacy, namely, where and from whom the demand should be made, because no demand was made upon any one on any occasion. And therefore I am of opinion that no interest runs.

It cannot make the slightest difference whether there is a balance in the hands of the official liquidator, or whether a call is to be made. The question is, whether you are entitled to interest? If you are entitled to interest, I should make a call to pay it; but I am of opinion you are not so entitled; and therefore, except upon all those debts which carry interest (and on those you must have interest according to the rate which they respectively carry according to the agreement between the parties), I must hold that you are not entitled to any interest.

I do not think the claim sent in under the winding-up amounts to anything, because a demand under the statute 3 & 4 Will. 4,

(1) 1 D. J. & S. 385.

M. R. 1867 ~~ *In re* HEREFORDSHIRE BANKING CO.

c. 42, must be made upon the person liable to pay. That statute never meant that, for example, a demand on assignees in bankruptcy would be sufficient for this purpose.

Solicitors: Mr. *G. F. Cooke;* Messrs. *Bower & Cotton;* Messrs. *Wood, Street, & Hayter,* agents for Mr. *L. W. Winterbotham, Stroud.*

M. R. 1867 ~~ *May* 7.

WARRICK *v.* QUEEN'S COLLEGE, OXFORD (No. 2).

Practice—Production of Documents—Privilege—Prior Dispute—Compromise.

A party to a suit cannot be required to produce documents relating to the compromise of a dispute between himself and a person not a party to the suit.

7 Ch. 313. 1 Q.B.D. 139

THIS was a suit by four persons alleging themselves to be freehold tenants of the manor of *Plumstead,* on behalf of themselves and all other such tenants, against the lords of the manor. The object of the suit was to establish certain rights of pasture, cutting turf, digging sand and gravel, and other privileges, over certain commons in the manor.

It appeared that the rights of the lords of the manor over one of the commons in question were the subject of a dispute which was still pending between them and the War Office; and that, prior to the institution of this suit, various communications had passed between the disputing parties and their solicitors, with a view to effect a compromise of the dispute. In particular the lords of the manor had, about the year 1862, submitted to the War Office a statement of the title under which they claimed the common, and the draft of a lease of part thereof proposed to be granted by them to the War Office.

The Defendants having been required by the Plaintiffs to make an affidavit as to documents in their possession, submitted that they were not bound to produce the documents relating to the proposed compromise, on the ground that they were privileged communications. The question was brought before the Court on the 12th of February, when the Master of the Rolls expressed an opinion that the Defendants could not be compelled to produce

these documents, but required them to make a further affidavit as to their nature. This affidavit having been made, stating the nature of the documents as above described,

Mr. *E. R. Turner* now applied for an order for the production of the documents in question. It was quite clear that they did not fall within the rule as to privileged communications. That rule extended only to communications between a client and his counsel, solicitors, or agents: *Shore* v. *Bedford* (1); *Sawyer* v. *Birchmore* (2); *Desborough* v. *Rawlins* (3); *Marsh* v. *Keith* (4); *Ford* v. *Tennant* (5). Here the communications were made by the Defendants to third parties, who, prior to the commencement of the suit, were engaged in disputes with the Defendants.

Mr. *Selwyn*, Q.C., and Mr. *Lindley*, for the Defendants, were not called upon.

LORD ROMILLY, M.R.:—

I adhere to the opinion I expressed on the former occasion. I do not dispute the authority of any one of the cases which have been cited; on the contrary, I assent to them all. The only question before me is this:—A Plaintiff files a bill against the lord of a manor, claiming certain rights over certain commons within the manor. Previously to the bill being filed the lord of the manor entered into an agreement with certain other persons who claimed a right upon the land for the compromise of that claim; and the documents relating to that compromise are sought to be seen in this suit without the other persons who were parties to the compromise being parties to the suit. I am of opinion that that cannot be obtained. I express no opinion as to what might be the case if the War Office were parties to this suit; but I do not think the doctrines relating to privilege affect the question on this summons in the slightest degree. The question is, whether a person who claims property in the hands of the Defendant is entitled to require the terms of, and the documents relating to, a compromise made between the Defendant and a third person

(1) 5 Man. & G. 271.
(2) 3 My. & K. 572.
(3) 3 My. & Cr. 515.
(4) 1 Dr. & Sm. 342, 6 Jur. N.S. 1192
(5) 32 Beav. 162, 9 Jur. N.S. 292

M. R. 1867 WARRICK v. QUEEN'S COLLEGE, OXFORD (No. 2).

relating to the same property at an anterior period, to be produced without that other party to the compromise being before the Court. I am of opinion that this Court will not compel such production.

Solicitor for the Plaintiffs: Mr. *P. H. Lawrence.*
Solicitors for the Defendants: Messrs. *White, Borrett, & White.*

M. R. 1867 *May* 9.

STRATFORD *v.* BAKER.

Practice—Order of Revivor obtained by Defendant—Notice to Plaintiff—Motion to discharge—Title of Notice of Motion.

An order of revivor, obtained by Defendant to prosecute a suit which has become abated by the death of another Defendant after decree, is irregular when obtained without notice to the Plaintiff, though the Plaintiff is a trustee who has no substantial interest in the suit.

A notice of motion to discharge an order so obtained is properly intituled in the matter of the abated suit.

THIS was a motion to discharge an order of revivor obtained on the 27th of March last.

The original suit was instituted to carry into execution the trusts of a deed by which the Defendant, *A. Dackombe*, had conveyed certain estates to *Stratford* and *Baker* upon trust, out of the rents, or by sale or mortgage, to raise a sum of £3000, to be held upon trusts for the benefit of his children, and, subject thereto, for the benefit of the grantor. *Stratford*, one of the trustees, was the sole Plaintiff, and his co-trustee, *Baker*, and *Dackombe's* children were Defendants. A decree was made, in 1857, directing an account of the rents and profits of the trust estates, and of the moneys received from sales, and directing a sale of the unsold property.

In January, 1866, *Stratford* died, and in April, 1866, his widow, who was his executrix, took out the common order to revive against the Defendants. The accounts had not been taken, and the bulk of the property remained unsold.

In January, 1867, *Dackombe* died; but his will, which purported to give his real and personal estates to *Baker*, and to appoint him

executor, being contested, had not been proved. Some of *Dackombe's* children subsequently obtained an order to change their solicitor, and, on the 22nd of March, 1867, they obtained an order stating the death of *Dackombe*, and that it was alleged that he had made a will under which *Baker* was his devisee, and directing that the suit should be revived against Mrs. *Stratford* and the remaining Defendants in the suit, and that the decree should be prosecuted between themselves as Plaintiffs, and Mrs. *Stratford*, and *Baker*, as trustee of the deed, and as devisee under *Dackombe's* will, and the remaining Defendants to the suit, as Defendants, and that what was found due from *Stratford* might be answered by Mrs. *Stratford* out of his assets, and if she did not admit assets, then that an account of his estate might be taken.

No application to Mrs. *Stratford* as to reviving the suit on the death of *Dackombe* had been made, and the above order was obtained without notice to her.

The present motion was made on behalf of Mrs. *Stratford* to discharge the last order, the notice of motion being intituled in the original suit, and in her own revived suit, but not in the suit as revived by the last order.

Mr. *Cadman Jones*, for the motion:—

The Defendants could not revive after decree unless the Plaintiff refused to revive, or without notice to the Plaintiff: *Noble* v. *Stow* (No. 2) (1). A bill of revivor containing the statements in this order would have been demurrable on two grounds: first, because it does not state that *Dackombe* made a will, but only that it is alleged that he did; and on the substantial ground that it does not bring all proper parties before the Court, since the accounts cannot be proceeded with in the absence of *Dackombe's* personal representative. This objection is fatal to the order.

Mr. *Method*, for some of the parties beneficially interested, supported the motion.

Mr. *T. A. Roberts*, *contrà*:—

After decree a Defendant may revive if a Plaintiff neglects to

(1) 30 Beav. 512, 1 Jur. N.S. 147

M. R. 1867 STRATFORD v. BAKER.

do so: *Mitford* on Pleading (1). Here there has been great neglect, nothing substantial having been done in the suit for years. Notice need not be given to the Plaintiff before applying to revive: *Devaynes* v. *Morris* (2); *Lee* v. *Lee* (3); *Horwood* v. *Schmedes* (4); *Williams* v. *Cooke* (5). *Noble* v. *Stow* (6) only applies to cases where the Plaintiff has an interest in the subject matter of the suit.

The notice of motion is wrongly intituled, and the affidavit in support, which is headed in the same way, is irregular. An indictment for perjury could not be maintained upon it, for our order is valid till set aside, and there is, therefore, at this present time, no subsisting suit with such a title as that which the notice of motion bears. As regards *Dackombe's* personal representative, he has no substantial interest, and the Court can appoint a representative. This application is purely technical, and its only real object is to take the conduct of the proceedings out of the hands of the Defendants, who obtained the order to revive.

LORD ROMILLY, M.R.:—

I am of opinion that the order of revivor must be discharged. The doctrine of *Noble* v. *Stow* generally applies to every case, not merely to cases where the Plaintiff has a substantial interest,—the reason of the rule being that the Court discourages attempts to snatch the conduct of a cause. I have always been very strict in taking away the conduct of a cause from the Plaintiff who neglects to proceed with it, and giving the conduct to a Defendant; but this is not the right way for a Defendant to get the conduct of the cause. He ought to apply for it in Chambers, and not attempt to snatch it by an order of revivor. I am of opinion, also, that the notice of motion and affidavit in support are rightly intituled in the original and revived suits, omitting the suit which it is sought to set aside.

The parties who obtained the order must pay Mrs. *Stratford's* costs of this application, but I cannot order them to pay the costs of the other parties who have appeared.

(1) 5th Ed. p. 95.
(2) 1 My. & Cr. 213.
(3) 10 Hare, App. lxxii.; 4 D. M. & G. 219.
(4) 12 Ves. 311.
(5) 10 Ves. 406.
(6) 30 Beav. 512.

Mr. *Method* asked that, as his clients had been served, their costs might be paid by Mrs. *Stratford*.

LORD ROMILLY, M.R.:—I cannot order that. You ought not to have appeared.

Solicitors for Mrs. *Stratford*: Messrs. *Evans & Foster*.

Solicitors for the parties who obtained the order to revive: Messrs. *Walker & Archer*.

Solicitors for other Defendants: Mr. *Kempster*; Messrs. *Loxley & Heath*.

V.-C. S.
1867
April 18.

HILL *v.* BOYLE.

Will—Breach of Trust—Assignment of Claim.

Tenant for life of a trust estate mortgaged it, and it was sold by the mortgagee. After the sale, the purchaser and mortgagee, for a nominal consideration, assigned to the tenant for life certain alleged arrears of interest and profits of part of the trust fund, which, as the Plaintiff alleged, the trustees had made in excess of the interest for which they had accounted. A bill filed against the trustees, on the title conferred by this assignment, for an account of their profits was dismissed with costs.

FRANCIS HILL (the uncle), by his will, dated the 28th of March, 1835, having made a provision for his wife, devised to *Thomas Bate* and *William Robins*, their heirs and assigns, certain freehold lands at the *Lye*, upon trust, at their discretion, to sell the mines and minerals lying under the said land for the best prices that could be obtained, and he empowered his trustees to lease such parts of the surface of the said land as should be requisite for working the same; and the testator declared that the said trustees, or other the trustees for the time being acting under his will, should stand and be possessed of all and singular the moneys to arise from the sale of the said mines and minerals and ores, upon trust to place out and invest the same in their names in some or one of the parliamentary or public stocks or funds of *Great Britain*, or in or upon government or real securities, and from time to time, at their discretion, to call in, sell, or dispose of, the stocks, funds, or securities, in or upon which the same trust moneys, or any part thereof, should for the time being be invested, and to place out and invest the same again in, or upon, new or other stocks, funds, or securities, of the like nature, until the same should become payable or transferable pursuant to the directions of his will; and upon trust during the life of testator's nephew, *Francis Hill* (the Plaintiff), to pay the interest, dividends, and annual proceeds of all and singular the said trust moneys, stocks, and securities, when and as the same should come in and be received, unto the said *Francis Hill* for his life. The testator then declared certain trusts, subsequent to the death of *Francis Hill*,

in favour of his children. He died on the 4th of April, 1835, leaving his trustees, *Bate* and *Robins*, him surviving, and his will was proved by his executors, *T. Pergeter* and *W. B. Collis*.

By an indenture, dated the 23rd of March, 1837, the trustees sold the mines, by way of lease for fourteen years, renewable for the same term, to *Francis Rufford*, for £7000, *Rufford* paid £2000 at once, and £1000 a year for five years. In 1848, the Plaintiff mortgaged, with power of sale, his life estate to *James Fisher*, who, by indenture dated the 4th of October, 1858, sold the life estate to *James Tree*, and, by a deed dated the 8th of October, 1858, *Tree* mortgaged the life estate to *Johnson*. *Bate* died on the 13th of October, 1846, and *Robins* in July, 1860.

By an indenture, dated the 25th of March, 1861, between *James Tree*, of the city of *Worcester*, and *James Fisher*, of *Cheltenham*, of the one part, and *Francis Hill* (the Plaintiff) of the other part, reciting that *Hill* became entitled, under his uncle's will, to a life estate in the interest and dividends of divers sums of money and securities, and in the interest of a sum of money to arise from the sale of minerals, and directed to be laid out in the names of the executors, and reciting that by virtue of several indentures the said life estate and interest in the said money became vested in the said *James Fisher*, and that the said *James Fisher* had since sold and assigned his interest to *James Tree*, but the whole of the purchase-money had not been paid; And reciting that at the date of the assignment to *Fisher* from *Hill*, *Hill* considered and stated that there was a considerable arrear of interest due to him from the executors and trustees acting under his uncle's will, but which arrears neither *Fisher* nor *Tree* would attempt to recover; and reciting that *Hill* had requested *Tree* and *Fisher* to release, assign, and give up to him, the said *Hill*, all arrears of interest due from the executors and trustees of the will of his uncle that accrued prior to the 1st of January, 1861, and were still unpaid, which they, the said *Fisher* and *Tree*, had agreed to do: It was by the said indenture witnessed, that in pursuance of the said agreement, and in consideration of five shillings paid to *Tree* and *Fisher* on the execution of the now stating indenture, they, the said *Tree* and *Fisher*, and each of them, did thereby release, assign, and give up to the said *Hill*, his executors, administrators, and

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assigns, all the arrears of the interest, dividends, and annual produce, which, previous to the 1st of January, 1861, arose from, or ought to have been paid upon, all or any part of the said real and personal estate of the said *Francis Hill*, the uncle, and to which the said *Hill* was entitled, subject to the mortgages thereon held by the said *James Fisher*, as owner of the life estate therein under the will of the said *Francis Hill*, the uncle. Then followed the general words, with a *habendum* for *Hill's* absolute use and benefit, and power to sue for and recover the same.

The Plaintiff, on the 21st of April, 1865, filed this bill against the Defendants, who were the representatives of the trustees, setting forth the will of the testator and the mortgage deeds, alleging that instead of investing the moneys from time to time, as they were received, in the manner directed by the will, the trustees used the moneys, or part of them, in their business of bankers, and lent such moneys at a high rate of interest to their customers and others, and made large gains therewith; that they suppressed these facts from the Plaintiff and his mortgagees, and paid them only a small rate of interest, and much less than the amount received by them; and that some of the securities alleged to have been taken for parts of the fund were, in fact, taken for debts due to the said *T. Bates* and *W. Robins*. The bill alleged that the Plaintiff made numerous applications to the trustees, and to the surviving trustee, for an account of the investments, but without effect, and from his inability to obtain an account became embarrassed in circumstances.

The Plaintiff charged that a considerable sum was due and owing in respect of the dividends and interest, gains and profits, upon and in respect of the said trust moneys, up to the 1st of January, 1861, and that so it would appear if the Defendants set forth proper accounts. The Plaintiff further charged that *Bate* and *Robins* made up their accounts with their customers with half-yearly rests, according to the custom of bankers, and that he was entitled to have the account taken in the same manner. He further charged that he had been unable to prosecute his claim earlier for want of pecuniary means. The bill prayed for an inquiry as to the securities on which the said sum of £7000 was invested up to the 1st of January, 1861, and of the dividends and interest, gains and

profits, produced thereby, and that it might be declared that the Plaintiff was entitled to be paid the same, or, at his option, £5 per centum on the said last-mentioned trust moneys from time to time in the hands of the trustees, or the survivor, or of the executors, or of any banking firm of which they were members, after giving credit for all moneys paid on account, and that the Defendants (other than the mortgagee) might be decreed to pay the same out of the testator's assets.

Mr. *Dickinson*, Q.C., and Mr. *W. Morris*, for the Plaintiff, stated the case to the Court.

The VICE-CHANCELLOR:—Have you any precedent for a bill of this description.

Mr. *Dickinson*:—None is necessary. The Plaintiff sues as assignee of a sum of money uncertain in amount at present, but ascertainable on an account taken, which is due from the Defendants by the rules of this Court. Suppose there had been no mortgage, it is quite clear the Plaintiff would be in a position to maintain the suit. Then go one step further, suppose the mortgagee were Plaintiff, it was equally clear that the suit would be properly constructed, though, perhaps, in the result nothing might be found due. Then why cannot the assignee of these moneys from the mortgagee maintain the suit which his assignor could maintain as a matter of course.

It is submitted, therefore, that the Plaintiff is entitled to the decree asked by the bill.

Mr. *Bacon*, Q.C., Mr. *Speed*, Mr. *Greene*, Q.C., and Mr. *Hallett*, for the representatives of the trustees, and Mr. *Bagshawe* for the mortgagee, were not called on.

SIR JOHN STUART, V.C.:—

I can recollect no case like the present. The Plaintiff does not sue as assignee of the trust estate, or of any part of it. He is assignee of nothing but of a right to sue the trustee for the chance of recovering from him interest or profits of part of the trust funds, which were, for a certain period, in his hands. In my opinion

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such an interest is not assignable, nor a suit in respect of it maintainable in this Court. The *cestuis que trust*, declining themselves to institute proceedings for an alleged breach of trust, have, in consideration of five shillings, assigned the moneys recoverable in respect thereof to the Plaintiff.

The bill must be dismissed with costs.

Solicitor for the Plaintiff: Mr. *H. C. Barker.*

Solicitors for the Defendants: Messrs. *Benbow, Tucker, & Saltwell*; Mr. *Irwin*; Messrs. *Tucker & New.*

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V.-C. W.
1867
July 10, 12.

Will—Construction—Death "without leaving," held equivalent to Death "without having had," a Child.

Testator devised certain specific real estate to trustees and their heirs upon trust for his daughter *R.* for life, and after her decease, he gave the same unto and equally between all and every her children, if more than one, as tenants in common, their heirs and assigns; and if but one such child, to his or her heirs and assigns; and in case his daughter should depart this life under twenty-one, or afterwards, "without leaving any child or children," testator gave the same hereditaments and premises to his son *C.*, his heirs and assigns:—

Held, that the children of *R.* took at their births indefeasible interests in fee, in remainder expectant on the death of their mother.

THIS was a special case.

Charles Fitzmaurice Hill, by his will, dated the 19th of October, 1810, devised all his real estates to, and to the use of, trustees and their heirs, upon the trusts thereinafter declared. He then gave and devised a specific portion of the same estates unto his daughter *Rosa Hill*, and her assigns, for her life; and after her decease he gave and devised the same, and every part thereof, unto and equally between all and every the children of the body of his said daughter *Rosa*, if more than one, as tenants in common, and to their respective heirs and assigns for ever; and if but one such child, then to such only child, his or her heirs and assigns, and continued:—

"And in case my said daughter shall depart this life under the age of twenty-one years, or afterwards, without leaving any child or children of her body, then I give the same hereditaments and premises unto my son, *Charles Popham Hill*, his heirs and assigns for ever."

The will contained a specific devise of other part of the realty in favour of the same son.

Testator died on the 18th of June, 1811. *Rosa Hill* and *Charles Popham Hill* survived him. *Rosa*, who was born on the 19th of July, 1805, married the Rev. *James White*, who died on the 27th of March, 1862, leaving two children only of the marriage, of

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whom *James Logan White*, who attained twenty-one on the 25th of October, 1861, was now the only survivor. There had been seven children of the marriage.

Rosa White and her son were desirous of dealing with this property; and accordingly a special case had been agreed to, in which they were Plaintiffs, and *Charles Popham Hill* and the surviving trustee of the will were Defendants, to take the opinion of the Court as to whether the Plaintiffs could make a good title.

The case prayed the opinion of the Court upon the following questions:—

"1. What estates and interests did the Plaintiff, *Rosa White*, and her children respectively take under the said will of the said testator, *Charles Fitzmaurice Hill*, in the hereditaments and premises aforesaid, thereby devised?

"2. Is the said limitation over of the same hereditaments and premises in the same will contained in trust for the Defendant, *Charles Popham Hill*, his heirs and assigns, 'in case the said testator's daughter, the Plaintiff, *Rosa White*, should die under the age of twenty-one years, or afterwards, without leaving any child or children of her body,' to be construed literally, or to be construed as meaning without having any child or children of her body?"

Mr. *G. M. Giffard*, Q.C., and Mr. *Faber*, for the Plaintiffs:—

Our contention is, that the phrase "without leaving any child or children," must be read as meaning without "having had" a child, on the principle expressed in *Kennedy* v. *Sedgwick* (1); that the gift over would be contradictory if the word "leaving" were to be read literally: *Ex parte Hooper* (2).

Mr. *J. H. Taylor*, for the trustee.

Mr. *Kenyon*, Q.C., and Mr. *Lewin*, for *Charles P. Hill*:—

The cases cited are exceptions to the general rule—that words are to have their natural and ordinary construction, unless the result be contradictory.

(1) 3 K. & J. 540. (2) 1 Drew. 264.

In *Ex parte Hooper* (1), it appears from the judgment that the Vice-Chancellor proceeded on two special grounds; one, that the gift over was upon *A.'s* death "without leaving *issue*," and as *A.* left a grandchild at her death there would have been an intestacy; the other, that in two other similar devises to other persons, the testator had used the word "having" in the place where, in this particular gift, he used the word "leaving;" shewing that by "leaving" he meant "having."

In *Whatford* v. *Moore* (2) Lord *Cottenham* was of opinion that modern cases in favour of vesting had been carried to their full extent; a view which was supported by Sir *G. J. Turner* in *Farrer* v. *Barker* (3).

In *Hedges* v. *Harpur* (4) a dying "without issue" was held to mean without issue living at the death; and the same construction was put upon the words "without leaving any issue of her body at the time of her decease," in *Young* v. *Turner* (5), where the words, "at the time of her decease," were clearly surplusage; all the Judges having admitted that "leaving" means "leaving at the time of death."

[The VICE-CHANCELLOR:—Surely that is a fallacy. The *primâ facie* meaning of "leaving" is "leaving at the death." The Courts have said that "leaving" may mean "having;" but it would be much more difficult to turn "leaving at the time of her decease" into "having," than "leaving" simply.]

The principle of those cases applies to the present, there being no inconsistency here in giving a literal meaning to the words.

Departure from the literal sense of the word "leaving" first crept in from the decisions in cases of portions, such as *Woodcock* v. *Duke of Dorset* (6); *Emperor* v. *Rolfe* (7). This appears from the observations of Sir *John Leach* in *Maitland* v. *Chalie* (8).

[The VICE-CHANCELLOR referred to *Marshall* v. *Hill* (9).]

(1) 1 Drew. 264.
(2) 3 My. & Cr. 270.
(3) 9 Hare, 737.
(4) 3 De G. & J. 129, 4 Jur. N.S. 1209
(5) 1 B. & S. 550.
(6) 3 Bro. C. C. 569; 3 V. & B. 82 (*c*).
(7) 1 Ves. Sen. 208.
(8) 6 Madd. 243.
(9) 2 M. & S. 608.

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That case turned upon the opinion of *Saunders* in *Purefoy* v. *Rogers* (1), and not upon the same points as this.

Maitland v. *Chalie* (2) depended upon the circumstance that a time had been fixed for vesting. So in *Casamajor* v. *Strode* (3), there was a gift of income to persons for their respective lives, and, on their respective deaths, of the capital to their children, to be paid to sons at twenty-one, and to daughters at twenty-one or marriage; and in case of the death of any of the tenants for life "without leaving any children or child," the share was to go over to the survivors. The Vice-Chancellor of *England* held that that gave a vested interest to the children upon their attaining twenty-one or marriage. This was followed by Vice-Chancellor *Knight Bruce* in *Re Thompson's Trusts* (4). But in these cases there was the circumstance that does not occur here of a direction to vest at a particular period, in some instances with a gift over to survivors. These cases with special circumstances do not apply. *Kennedy* v. *Sedgwick* (5) is distinguishable on the like grounds.

The case of *Bythesea* v. *Bythesea* (6) is very important, inasmuch as here the current of decision took a turn. There there was a gift by will of income to *A.* for life, and of the capital, after his decease, "in case he should leave a child or children," in trust for all and every such children at twenty-one, and in case *A.* should "leave no child," over. *A.* had a child who attained twenty-one, and died in his father's lifetime, leaving a widow and child surviving him. Nevertheless, it was held in this branch of the Court, and by the Court of Appeal, that the widow and child were excluded, and the gift over took effect.

In the present case there is a simple devise to the children and their heirs; and then a direction that if *Rosa* should leave no child, the gift is to go over. No period of vesting is indicated, so that, according to the Plaintiffs' view, if *Rosa* had had one child only, who had died immediately after its birth, that child would have taken an absolute interest, and the gift over to the son would have been defeated.

(1) 2 Saund. 388.
(2) 6 Madd. 243.
(3) 8 Jur. 14.
(4) 5 De G. & Sm. 667.
(5) 3 K. & J. 540.
(6) 23 L. J. (Ch.) 1004; 17 Jur. 645.

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In *Sheffield* v. *Kennett* (1), where there was a bequest of £9000 to *A.* for life, and afterwards, if she should "leave" any children, in trust to divide it amongst "such children," to be payable and vested at twenty-one, with a gift over if the daughter should "have" no child who should arrive at twenty-one; the Master of the Rolls, and the Lords Justices on appeal, held, that a daughter of *A.* who attained twenty-one and married, but died in the lifetime of *A.*, took no share.

In the present case there is a gift with a double aspect: 1. If *Rosa* should die under twenty-one; 2. If she should die afterwards without leaving a child or children. If she had died under twenty-one, leaving a child, *Charles P. Hill* would have taken the whole. The testator may have wished to discourage his daughter marrying under age, and may have preferred his son to his daughter's children if she were to marry under twenty-one.

SIR W. PAGE WOOD, V.C.:—

I think I must follow the authority of Vice-Chancellor *Kindersley* in *Ex parte Hooper* (2), which is the only case that seems to be precisely in point. In that case, as here, there was a gift to *A.* for life, with an absolute vested remainder to her children. In this case, the gift is followed by the words, "In case she shall die under the age of twenty-one, or afterwards, without leaving any child or children of her body;" and then there is a gift over to *Charles Popham Hill.* In *Ex parte Hooper* the words were: "In case she should die without leaving any issue of her body." No doubt the words there were not commensurate with the gift; the gift being to children and not to the issue. But I do not apprehend that that made any difference with regard to the rule which has induced the Court to construe "leaving" as "having."

The case of *Ex parte Hooper* is rather weaker than the present, because the principle which has prevailed in all these cases is, that where you find an intention that a child shall take a vested interest at a particular period, and words introduced which would divest the interest in the event of the parent dying without leaving the child surviving, if the interest has once vested, the Court, considering

(1) 27 Beav. 207. (2) 1 Drew. 264.

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that the testator has intended to make provision for the child, will, unless the testator has too clearly expressed his opinion to admit a doubt, struggle to maintain the vested gift rather than take it away from the issue in favour of some collateral objects.

Now in *Ex parte Hooper* (1) that result would have been attained without the necessity of construing "leaving," as "having," because the gift over was in the event of death without leaving issue, and as the tenant for life left a grandchild, the gift over could not take effect, and the grandchild would not have been deprived. So that one main reason which has induced the Court to come to the above conclusion did not exist there in its full force.

In the other case that has been cited, of *Kennedy* v. *Sedgwick* (2), there was found an additional circumstance which strengthened the case, namely, a direction that it should vest in the children at twenty-one; and then there was a gift over in the event of the parent dying without leaving children. In that case "leaving" was construed "having." The intent to vest was plain and manifest—the intent to divest was not so plain and manifest. "Leaving" is a word that may be construed, in its primary sense, as leaving on the decease of the person to whom the word applies; but it has been construed as "having," rather than that a child shall be deprived of a vested interest which seems to have been made as a provision for it. It is true that the remark was made in *Bythesea* v. *Bythesea* (3) (and a similar observation was also made by Lord *St. Leonards* in *Kimberly* v. *Tew* (4)) that, "The existence of marriage settlements, *per se*, proves an intention to provide for children generally, but a will is arbitrary in its nature, and such may be, or may not be, the intention. In both cases the question is one of intention; and in a will so framed as to shew an intention to provide for children the principle may be properly applied, as in *Tucker* v. *Harris* (5), and *Kimberly* v. *Tew*." And this remark is further made in the same judgment:—"In all the cases the question has arisen between the eldest son and the other children, or between the surviving children and the representatives of deceased children, and in none of the cases that I am

(1) 1 Drew. 264.
(2) 3 K. & J. 540.
(3) 23 L. J. (Ch.) 1004, 1006.
(4) 4 D. & War. 139, 150.
(5) 5 Sim. 538.

aware of has there been a limitation over in favour of third persons."

Now, the circumstances of this case fully justify me in applying the principle, originally founded on marriage settlements, that the Court will favour a plain intention to provide for children, where the contest is between surviving children and the representatives of deceased children. The testator has here made careful arrangements for the division of his property among his children; and the contest at this moment is between a son of the tenant for life, who may be living at her death (she is now living), and her brother. Therefore, I have every reason for applying the doctrine which has hitherto been applied to cases of this kind.

I have had more than once to consider whether there is really any substantial difference in the rule, in those cases where the testator has not taken care to direct that the childrens' shares shall be vested at twenty-one, and not before. It was observed in *Bythesea* v. *Bythesea* (1) that, under a will so framed, a child just born might take a share and die, and it may be supposed that a testator would not be desirous of giving anything to a person having so brief an existence. But it does not strike me that that observation has very great force; for this reason, that in such a case the provision made for the family takes effect. It is true the share would go to the child's father, as heir-at-law, as the law now stands; but still, that is a provision made for the family; and the real question is this, does the testator, in carefully providing for his child *A.* with a portion of his fortune, desire that portion to be taken away from the descendants of *A.* and go over to another branch of the family? In settlements the Court has held that that was not the intention, but that the intention was to provide for the families of the several children. In this case, if I were to hold that there is a gift for life, and then, on the death of the tenant for life without leaving a child, a gift over, although there may be remoter issue living, I should be erring against the rule. It appears to me there is no substantial distinction between a testator saying that property shall vest at twenty-one, and a testator making a devise or bequest in such terms as would vest it, by operation of law, in the child as soon as it is born.

(1) 23 L. J. (Ch.) 1004; 17 Jur. 645.

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In *Bythesea* v. *Bythesea* (1) the gift was so plain that there was no avoiding it; you could not find a gift to the child; the gift was to such as should be living at the death. Here there are clear absolute vested interests given to the children beyond dispute, until we reach the subsequent clause. In *Young* v. *Turner* (2) the language throughout the will pointed very plainly to the not leaving issue at the time of the death as the essential condition of the gift over. The only question I have to consider is, whether the word "leaving" can be construed here as "having," and I find that it has been so construed in like cases. I can find no substantial difference between vesting at twenty-one, and vesting at the birth; and then all the cases say, if there is a vested interest it shall not be divested by the simple word "leaving" in a case of this kind, where a parent is providing for children by his will. It cannot deprive the family of one of the children of that provision because the child does not survive the tenant for life. There will, therefore, be a declaration that the children of the Plaintiff, *Rosa White*, took at their births indefeasible interests in fee, in remainder expectant on the decease of their mother.

Solicitors: Messrs. *Woodrooffe & Plaskitt*, agents for Mr. *Sewell, Bonchurch, Isle of Wight.*

V.-C. W. 1867 *June* 28, 29.

ENTWISTLE *v.* DAVIS.

Will—Charity—Mortmain—9 *Geo.* 2, *c.* 36—*Shares in a Land Company.*

4 Ch. D. 656
7 Ch. D. 342
15 Ch. D. 366

Shares in the *British Land Company*, the business of which was purchasing and improving lands, and selling or letting the same, and in the *National Freehold Land Society*, established for "raising by subscription a fund out of which any member should receive the amount of his share for the erection or purchase of a dwelling-house, or other real or leasehold estate," held not to be an interest in land within the statute 9 Geo. 2, c. 36.

JEREMIAH SMITH, by his will, dated the 29th of January, 1864, after directing his executors to sell by auction his real and personal estate and effects, and pay the different legacies therein named, gave the rest and residue of his real and personal estate,

(1) 23 L. J. (Ch.) 1004; 17 Jur. 645. (2) 1 B. & S. 550.

after payment of funeral and testamentary expenses, to the trustees of the *Bethnal Green Philanthropic Pension Society*, and directed the receipts of the respective treasurers to be an effectual discharge to his trustees.

The testator was not seised of any real estate at the time of his death, and his personal estate, not specifically bequeathed, consisted of a leasehold estate at *Bethnal Green*, twenty £5 shares in the *British Land Company*, six £30 completed shares and one uncompleted share in the *National Freehold Land Society*, and cash in the house (£31 16*s.*)

The leasehold estate had been sold for £740; the shares in the *British Land Company* had produced £151 12*s.* 6*d.*, and those in the *National Freehold Land Society* £200 19*s.* 11*d.*

The question in the case, which came before the Court upon further consideration, was, whether the shares in the two companies constituted an interest in land within the meaning of the Act 9 Geo. 2, c. 36.

By an abstract of the deed of settlement of the *British Land Company, Limited*, dated the 14th of March, 1856 (which was alone produced in Court), the business of the company was stated to be that "of purchasing (with the license of the Board of Trade) lands and hereditaments in *Great Britain* and *Ireland*, and improving the same by draining and laying out, and making thereon roads and other ways, and parks, gardens, pleasure grounds, play grounds, and other places, for recreation, or promoting health and convenience, and by planting suitable buildings thereon, and selling or letting the same either before or after erection of buildings, or execution of works thereon, and such other business as is or shall be incident to that above-mentioned."

The capital was to consist of £100,000, in 10,000 shares of £10 each. Subject to the deed of settlement and the control of general meetings, the directors were to manage the affairs of the company; to apply to the Board of Trade for license to hold lands; to improve, build upon, sell, mortgage, lease, dedicate to public, or otherwise deal with lands so acquired; and to apply to Parliament for authority to take or use any public or private lands, or do other acts for the company. Shares were to be personal estate, and upon the dissolution of the company the directors were to wind

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up the company's affairs, get in and sell the assets, and pay the debts, and divide any surplus among the shareholders, and after three years divide any unclaimed dividends among the other shareholders. It was also provided, that on dissolution the directors and shareholders might purchase the assets.

The *National Freehold Land Company* was established pursuant to 6 & 7 Will. 4, c. 32, and its objects, according to its rules, were to raise by the subscriptions of the members, and in shares of £30 each, a fund out of which every member should receive the amount or value of his share for the erection or purchase of a dwelling house or dwelling houses, or other real or leasehold estate.

Whenever the money in hand should, in the opinion of the executive committee, be sufficient for the purpose, it was to be employed in advancing the shares of those members whose subscriptions were not in arrear, and all money not so employed was to be laid out in such investments, or advanced upon such legal or equitable securities as the law permits, in the names of the trustees, but under the direction of the executive committee.

Members receiving advances were to give security by mortgage to the satisfaction of the executive committee.

Mr. *Willcock*, Q.C., for Plaintiffs, the executors of Mr. *Smith's* will.

Mr. *Amphlett*, Q.C., and Mr. *Bagshawe*, for the trustees of the *Bethnal Green Society*, contended that the shares in these two companies were pure personalty, and well given to the charity The mere holding of land by a company for the purposes of their undertaking, whether as an investment of capital, or as a means for erecting their warehouses, does not make the shares in that company an interest in land, especially where, as here, no individual member can claim to have any aliquot proportion of the land itself, and his interest is limited to his share of the profits when realized: *Hayter* v. *Tucker* (1); *Myers* v. *Perigal* (2); *Edwards* v. *Hall* (3).

(1) 4 K. & J. 243. 4 Jur N S 257 (2) 2 D. M. & G. 599. 17 Jur 145.
(3) 11 Hare, 1; 6 D. M. & G. 74. 17 Jur 593; 1 Jur N S 1189

[The VICE-CHANCELLOR referred to *Watson* v. *Spratley* (1).]

Mr. *G. M. Giffard*, Q.C., and Mr. *J. F. Villiers*, for the testator's next of kin, contended that the sole object of these two companies being the acquisition of and dealing with land for the purpose of making profits, a bequest of the shares to charity was void under the *Statute of Mortmain*: *Morris* v. *Glynn* (2). In the case of a mine (*Hayter* v. *Tucker* (3)) the use of the land is merely transitory, and only auxiliary to the trading purpose; but these companies are in no sense trading companies, their object being to enable members to acquire from the company land which has been purchased with their subscriptions, and they are directly instanced by Lord *Romilly* (4):—"If it were a company established for the purpose of acquiring land and dividing it, or letting it out, would not that be an interest in land?" Unless, therefore, the Court is prepared to overrule that authority, the bequest of these shares must be held to be within the *Statute of Mortmain*.

SIR W. PAGE WOOD, V.C.:—

I am of opinion that these shares are not an interest in land within the statute 9 Geo. 2, c. 36. Since the decision in *Myers* v. *Perigal*, the test is not whether the holder of the shares can in some sense be said to be interested in land, but whether the share is such a share as, under any ordinary state of circumstances, can result to him in the shape of land. In other words, is the right of the shareholder merely a right to call for his share of the profits, and not for a specific part of the land itself? With very great deference to the Master of the Rolls, I cannot in this case follow his decision in *Morris* v. *Glynn*, where shares in the *Rhymney Iron Company*, which manufactured iron obtained from its own estates, were held to be an interest in land within the statute, the nature of the business, rather than the nature of the shares, being made the test. The case is analogous to that which has arisen where the gift is of property which has been derived under the will of a first testator, who has directed a conversion. If the

(1) 10 Ex. 222.
(2) 27 Beav. 218.
(3) 4 K. & J. 243.
(4) 27 Beav. 225.

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second testator is the sole owner, and has the option of taking it in *specie*, then it will be regarded as unconverted. If, however, from the second person being only one of several persons interested, the property can only come to him in its converted form, it must be regarded as converted and in the form of money. In *Edwards* v. *Hall* (1), Lord *Cranworth* considered the question as settled by *Myers* v. *Perigal* (2), and held that *Oxford Canal* shares, and shares in other companies where the profits were earned by the use of land, were not within the statute. As was observed by Lord *St. Leonards* in *Myers* v. *Perigal* (3): "Could any of the partners enter upon the lands, or claim any portion of the real estate for his private purposes? Or if there was a house upon the land, could any two or more of the members enter upon the occupation of such house? I apprehend they clearly could not; they would have no right to step upon the land; their whole interest in the property of the company is with reference to the shares bought, which represent their proportions of the profits. . . . In short, a member has no higher interest in the real estate of the company, than that of an ordinary partner seeking his share of the profits out of whatever property those profits might be found to have resulted."

So in the present case, although the *British Land Company* is a land company, established for the purpose of purchasing and improving land, and selling or letting the same, the directors, by clause 39, have the whole management of the affairs of the company entrusted to them. The dividends come to the shareholders in the shape of money only, and the shareholders have no right to claim any portion of the land which is held by the company for the purposes of its business. Even supposing the shares all became concentrated in one single shareholder, and he died, they would have to be divided in administering his estate as shares or money, and not as land. The provision that on dissolution the directors and shareholders may purchase the assets does not affect the question. The insertion of this clause may have arisen from some notion that they were prevented from bidding at a sale of the assets of the company.

The second society, the *National Land Company*, which does

(1) 6 D. M. & G. 74. (2) 2 D. M. & G. 599. 17 Jur. 145.
17 Jur. 1159 (3) 2 D. M. & G. 620. 17 Jur. 150

not seem to be a corporation,—though that is now unimportant, as the decision in *Myers* v. *Perigal* applies to shares in companies, whether incorporated or not,—is established for raising a fund out of which every member should receive the amount or value of his share "for the erection or purchase of a dwelling house or other real or leasehold estate." This looks at first sight certainly rather like an interest in land, but then, on the other hand, there is not a single provision in the rules that the money shall be laid out in land, or that any member can call for any aliquot portion of the land. There is nothing that gives the shareholders a direct interest in any specific land. They form themselves into a sort of tontine, by which they are enabled to get money on easy conditions, and draw it out for the purpose of investing it in land. As well might it be said that every person putting money into a bank with a view to afterwards investing such money in land, was therefore possessed of an interest in land. If an option had been given to every shareholder of taking a plot of land, something might have been said. But no such provision is to be found in the rules.

The gift of the leasehold has, of course, failed, but it must be declared that the shares in these companies are not an interest in land within the statute.

Solicitors: Mr. *J. Terry*; Mr. *F. T. Donne*.

V.-C. W.
1867
April 18.

MATHEWS *v.* MATHEWS.

Will—Devise—Construction of the Word "Freehold."

Testator devised to *A.* and *B.*, and their heirs, all his "freehold land, messuages or tenements, and hereditaments, respectively situate and being in, or forming the whole or part of" a set of buildings which he named, all in a particular parish. Of one part of the property thus described the testator at his death was seised in fee, subject to a lease; of a second part he was possessed for a term of years; and of (*X.*) a third part (now in question) he was possessed for a term of years, and he was also seised of the reversion of the same in fee from the expiration of three years after the end of the term:—

Held, that both the leasehold and the freehold interest of the testator in the portion (*X.*), passed under the above bequest.

GEORGE PORTER, who died on the 7th of September, 1856, by his will, dated the 13th of August, 1856, having made several other gifts and bequests, proceeded as follows:—

"I devise to my said sons, *Alfred Porter* and *Sydney Porter*, their heirs and assigns for ever, as tenants in common, and not as joint tenants, all my freehold land, messuages or tenements, and hereditaments, respectively situate and being in, or forming the whole or part of, *Cumberland Buildings, Cumberland Street, Marlborough Head Court, Green Walk*, and *John Street*, all in the parish of *Christchurch*, in the county of *Surrey*, or situate and being in, or forming the whole or part of, any other buildings, street, court, walk, or place in that parish: And also all my freehold land, messuages, or tenements and hereditaments, situate and being in *Bridge Street*, in the parish of *St. Mary Magdalen, Bermondsey*: And also all my piece of freehold land situate in the said parish of *Saint Mary Magdalen, Bermondsey*, and in my own occupation, and lying intermixed with my leasehold houses and business premises in *Fort Place, Bermondsey*, aforesaid, and which leasehold houses and business premises I have hereinafter given to the said *Alfred Porter* and *Sydney Porter*: And all rights, members, fixtures, roads, ways, and appurtenances to all the said land, messuages, or tenements and hereditaments, included in this devise belonging or in any way appertaining."

Testator then made a bequest of all those his "leasehold business offices and premises, situate in *Fort Street, Bermondsey*, aforesaid, and in *Kennington Road*," in which he then carried on his business of an architect and surveyor; and also of all those his "two leasehold houses adjoining or near to the said business premises in *Fort Place* aforesaid;" and the rights, members, and appurtenances to all the aforesaid leasehold premises belonging.

He subsequently made a devise and bequest of "all my real and personal estate of whatsoever nature and kind the same may be, except what I have hereinbefore specifically devised and bequeathed by this my will, and except estates in use in trust or by way of mortgage," upon certain trusts, the administration of which was the object of the present suit.

Certain house property in *Cumberland Street*, called *Cumberland Buildings*, other house property in *Green Walk*, and other house property in *Marlborough Head Court*, all in the parish of *Christchurch, Surrey*, and adjoining each other so as to form one block of buildings, were, at the death of the testator, thus situated as to estate:—

A., *B.*, and *C.*, parts thereof, had been leased, in 1803, by *Henry Bunn* to *Daniel Paylan* for a term expiring at Christmas, 1883, at a ground rent of £40 4*s.* a year. *D.*, another part, had been acquired by *Paylan* in some way unknown. *E.*, other part, was property in which it was presumed *Paylan* had an interest under the lease of 1803.

In 1808, parts *B.*, *C.*, *D.*, and *E.*, were underleased by *Paylan* to *Samuel Porter* for a term expiring on the 23rd of September, 1880, at a yearly rent of £105 (*Paylan* retaining *A.*).

In 1825, parts *C.*, *D.*, and *E.*, were underleased by *Samuel Porter* to *Philip Marley* for a term expiring at Michaelmas, 1880, at a like yearly rent of £105 (*S. Porter* retaining *B.*).

In 1831, *S. Porter's* leasehold interest in *B.*, *C.*, *D.*, and *E.*, passed to the testator, subject as to *C.*, *D.*, and *E.*, to the underlease to *Marley*.

In 1843, the testator purchased the freehold of *A.*, *B.*, *C.*, and *E.*, subject to the lease to *Paylan*.

Testator was also seised of a freehold house in *John Street*, which was subject to no lease.

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It thus appeared that as to part (*B.*, *C.*, and *E.*) of the property included in the above devise to *Alfred Porter* and *Sydney Porter*, the testator was possessed of a term of years in it, and was also entitled to the reversion of the same property in fee at the expiration of about three years after the end of the term. Of *A.* he was seised in fee subject to *Paylan's* lease, and in *D.* he had only a leasehold interest.

The question was raised upon the Chief Clerk's certificate, whether the testator's freehold and leasehold interest in portions *B.*, *C.*, and *E.* of the property both passed under the above specific devise, or whether the reversion in fee alone passed, and the term fell into the residuary bequest and devise.

Mr. *W. M. James*, Q.C., and Mr. *George Miller*, for the specific devisees:—

It cannot be disputed that if this property had been untouched by the will, the reversion would have gone to the heir and the term to the executor. But here the word "freehold" is a mere denomination by which the testator meant to designate the actual thing he wished to give. Having pointed out that thing, his intention was to give the whole of it.

The words must be read as meaning either "all my freehold estate in the land, messuages," &c., or "all the land, messuages, &c., of which I am freeholder." The second must be the true meaning; it could not have been the intention to give the property in the most disadvantageous way possible. The Master of the Rolls in *Miles* v. *Miles* (1) observes, "It is scarcely possible that he (the testator) can have intended that the freehold interest should go one way and the leasehold interest another way."

Mr. *Willcock*, Q.C., and Mr. *Everitt*, for the residuary devisees:—

The question in *Miles* v. *Miles* was wholly different. There the testator, after the date of the will, bought the reversion, and so merged the term. Here the term was alive, and the testator must have had the fact present to his mind.

(1) Law Rep. 1 Eq. 462, 466. 12 Jur. N.S. 116 35 Beav. 191

The words, "all my freehold land, messuages," &c., do not describe all the testator's interest in these houses. They do not, of course, carry the house that was leasehold; why, then, should they carry the portion of this house which was leasehold?

The words "rights, members, and appurtenances," do not help the devisee. That point was pressed and overruled in *Hall* v. *Fisher* (1), where a devise of "all that freehold farm, called," &c., was held not to pass a small portion of the farm that was leasehold. Other authorities on the same point are *Arkell* v. *Fletcher* (2), and *Stone* v. *Greening* (3).

Mr. *E. R. Adams*, for the trustees.

SIR W. PAGE WOOD, V.C.:—

This case is certainly a doubtful one; but I think there is enough to justify me in saying that the whole interest in this property passes by this devise.

From the whole will it is apparent that in this passage the testator is not describing the amount of his estate and interest in the particular part of his property referred to. It appears that there is part of the property, the subject of this devise, of which he is owner in fee, in other part he has only a leasehold interest. But in this particular portion of the property it happens that he is the freeholder, and so far the property, no doubt, is correctly described; but he has also a leasehold interest in it of considerable magnitude; and the question is, whether the description of the gift of the freehold house is such as to render it a gift of only the freehold interest in this particular part of the property, or whether it is sufficient to pass the leasehold interest as well as the freehold.

In the class of cases to which I was referred, it so happened that the testator had acquired a small bit of leasehold along with the freehold which he gave by his will, and it was held that the word "freehold" did not pass the leasehold portions of his estate. But that class of cases has no application to the present. In another case of *Miles* v. *Miles* (4), the testator, after the date of the

(1) 1 Coll. 47.
(2) 10 Sim. 299.
(3) 13 Sim. 390.
(4) Law Rep. 1 Eq. 462.

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will, merged the term which he had given, by purchasing the reversion. That is not the present case.

I agree so far with Mr. *Everitt* that the subsequent words in the devise will not help the devisee. I do not in the least rely upon the word "appurtenances."

My view of the case is this. Where a man is the owner of two separate farms, one of which is freehold, the other leasehold, if he makes a devise of the freehold farm, the office of the word "freehold," is to distinguish the property which is freehold from that which is only leasehold. But the case before me is this. The property referred to by the testator is a property which is rightly described as "freehold;" and the terms of his subsequent gifts shew that his mind is alive to the distinction between the two kinds of property. He then makes the devise in these terms:—[His Honour read the words.] He afterwards speaks of his "leasehold business offices."

It appears to me that the testator is here describing two sets of properties. He distinguishes those which he holds in fee from those which he holds upon lease, and he devises them in different ways. He does not advert to the fact that in some of the property he has both the freehold and a leasehold interest, and that has given rise to the difficulty. But it appears to me, on the whole, that by the expression "my freehold house" it is not intended to describe the testator's interest in the house. He means to describe the property, not the interest which he has in the property.

Before the *Wills Act*, if a man gave his freehold house at *A.* to *X.*, without adding words of inheritance, *X.* would take only a life interest. If he gave his freehold estate at *A.*, that would be a different thing. The distinction is very nice, no doubt; but he would then be supposed to be giving the whole of his interest.

Now here the word "freehold" does perform its function in two ways. In this very block of houses the testator had some portion that was leasehold; that of course will not pass, and so far the word "freehold" has discharged its function. But everything in which he had the fee will pass; and inasmuch as he had the fee in this particular portion, although he happened also to have another sort of interest in it, I apprehend he has sufficiently

denoted the thing which he intended to pass by the description of it as that in which he has the freehold.

Declaration accordingly.

Solicitors: Messrs. *Dyne & Harvey;* Messrs. *Roche & Gover;* Messrs. *Drummonds, Robinson, & Till, Croydon.*

DE GENDRE *v.* KENT.

Will—Future Dividends—Income or Corpus—Debitum in præsenti, solvendum in futuro.

In June, 1865, a dividend of 7 per cent. per annum upon certain shares held by the testatrix was declared payable on the 15th of July, 1865, and the 15th of January, 1866. Testatrix died on the 31st of December, 1865:—

Held, that the January dividend formed part of the *corpus* of her residuary estate, and did not pass under a bequest of the annual income of such residuary personal estate.

MISS *FUSSELL* at the date of her will, and at her death, possessed 1034 £25 shares in the *South Australian Company,* and 410 £25 shares in the *South Australian Banking Company.* On the 25th of June, 1865, the directors of the *South Australian Company* issued their annual report (containing the annual accounts of the company, made up in *South Australia* to the 31st of December, 1864, and in *London* to the 30th of April, 1865), in which the following statement appeared:—"The directors have the pleasure to recommend that a dividend of 7 per cent. per annum, free of income-tax, be declared payable on the 15th of July and the 15th of January next" (*i.e.* July, 1865, January, 1866). This report was duly adopted, and the dividends declared pursuant thereto.

In their annual report, issued on the 7th of June, 1865, and duly adopted, the directors of the *South Australian Banking Company,* from the balance of the profit and loss account, also recommended a dividend of 10 per cent. payable on the 15th of July, 1865, and the 15th of January, 1866.

The dividends in both cases were declared out of profits earned by the companies respectively previous to the declaration thereof.

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Miss *Fussell*, by her will (made in April, 1863), gave her residuary personal estate to trustees, upon trust to allow the same to remain as then invested, or otherwise to convert the same, or any part thereof, into money, and to invest the proceeds, and directed her trustees to stand possessed of such residuary personal estate upon trust to pay the annual income thereof, during the joint lives of Mr. and Mrs. *De Gendre*, unto Mrs. *De Gendre* for her separate use, without power of anticipation, with directions as to the disposition of the capital of such residuary personal estate, in case Mr. or Mrs. *De Gendre* should be the one surviving.

Miss *Fussell* died on the 31st of December, 1865, having received the July dividends on her *South Australian* and *South Australian Banking* shares. A question arose as to the second half-year's dividends on these shares declared in the lifetime of the testatrix, but not made payable until the 15th of January, 1865 (after her death), whether such dividends formed part of the income or part of the *corpus* of the testatrix's residuary personal estate.

This question was submitted to the Court by special case.

Mr. *Joshua Williams*, Q.C. (Mr. *Peck*, with him), for the Plaintiff Mrs. *De Gendre*, contended that as these dividends were not due or payable until after the death of the testatrix, they must be treated as forming part of the income of her residuary personal estate, and that the Plaintiff, as tenant for life of such income, was entitled: *Clive* v. *Clive* (1); *Re Maxwell's Trusts* (2); *Maclaren* v. *Stainton* (3). [*Wright* v. *Tuckett* (4) was referred to as distinguishable from this case.]

Mr. *Wickens*, for the husband, supported the same view, but did not argue the case.

Mr. *Osborne Morgan*, for the trustees of the will:—

The question is, whether the dividend has been completely severed from the stock and appropriated to the testatrix during her lifetime. If the relation of debtor and creditor has been constituted between the testatrix and the company as to the particular dividend during her lifetime, so that, although the actual payment

(1) Kay, 600.
(2) 1 H. & M. 610.
(3) 3 D. F. & J. 202.
(4) 1 J. & H. 266.

is postponed, it could have been mortgaged or assigned by her, it forms part of her personal estate, and cannot be treated as part of the annual profits which accrued after her death: *Lock* v. *Venables* (1); *Bates* v. *Mackinley* (2); *Wright* v. *Tuckett* (3). In this case there has been a complete appropriation, as the dividend was not only earned, but was also declared during the lifetime of the testatrix, and it is only the payment which, for the convenience of the company, has been postponed.

Mr. *Joshua Williams*, in reply.

SIR W. PAGE WOOD, V.C.:—

I confess I cannot but adhere to the view that I took in *Wright* v. *Tuckett*.

As soon as the dividend was declared, although payment, for convenience of the company, was postponed until the following January, from that moment the testatrix became entitled to it, although she could not have then recovered it, and it would have passed to her legatee had she specifically bequeathed it. I cannot distinguish it from the case of a bill of exchange at six months given by the company, upon which, although payment, for the convenience of the company, is postponed, a present claim would arise. This dividend, therefore, which was earned in the lifetime of the testatrix, though declared payable at a future time, was a debt due to her at the time of her death, and formed part of the *corpus* of her estate. She has given the tree to the Plaintiff, but as to this particular fruit it seems to have fallen during her (testatrix's) lifetime. The case of *Maclaren* v. *Stainton* (4), has no bearing upon this, and in no way affects the decision of the Master of the Rolls in *Lock* v. *Venables*, as in *Maclaren* v. *Stainton* the company never knew of the existence of the fund out of which the bonus was declared until after the testator's death. The question must, therefore, be answered by declaring that these dividends formed part of the *corpus* of the testatrix's residuary estate.

Solicitors: Messrs. *Robinson & Preston*.

(1) 27 Beav. 598. 6 Jur. N.S. 238
(2) 31 Beav. 280. 8 Jur. N.S. 299
(3) 1 J. & H. 266.
(4) 3 D. F. & J. 202. 7 Jur. N.S. 691

V.-C. W.

1867

July 15, 16.

STANHOPE *v.* COLLINGWOOD.

Settlement—Construction—"Eldest Son"—Clause of Exclusion—Period of ascertaining Class.

Upon the marriage of *A.*, who was tenant for life of *X.* estate, with remainder to his first and other sons in tail male, with *B.*, personal estate was settled upon the children of the marriage other than and except an eldest, second, or only son, for the time being entitled to *X.* estate, or the principal part thereof, for an estate in tail male in possession, or remainder immediately expectant on *A.'s* death.

After attaining twenty-one, *C.*, the eldest son of the marriage, and then entitled to an estate tail in remainder immediately expectant on the death of his father, in *X.* estate, joined with *A.* in barring the entail and re-settling the estate by deed, under the limitations of which he obtained for himself a rent-charge of £500 a year during *A.'s* life and an estate for life in remainder, with remainder to his issue in tail general, and remainders over:—

Held, that the death of *A.*, at which time *C.* was tenant for life only of *X.* estate, was the period for ascertaining whether *C.* was to be excluded from the personal estate, and that accordingly he was entitled to share in it; the circumstance that his change of position had arisen from his own act not having the effect of excluding him.

UPON the marriage of *Edward Collingwood* and *Arabella Calcraft*, the following property was dealt with:—

1. The manor of *North Dissington*, devised to the use of *Edward Collingwood* and his assigns for life, with remainder to preserve contingent remainders, with remainder to the use of the first and every other son of *Edward Collingwood* successively in tail male, with remainders over, subject to a proviso that if any person or persons, or the heirs male of their bodies, to whom an estate was thereinbefore limited in the property, should come into possession of certain estates comprised in the marriage settlement of Mr. and Mrs. *Stanhope*, then the limitations in favour of such person should cease, and the *North Dissington* property should go over to the person next beneficially entitled in remainder.

2. £10,627 7*s.* 6*d.* 3 per Cent. Consols, and £2115 9*s.* 4*d.* 4 per Cent. Bank Annuities, to which Miss *Calcraft* was entitled.

3. A future sum of £15,000, resulting from insurances to be effected by *Edward Collingwood* upon his life, payment of the premiums being secured by a term of ninety-nine years to be

created in the *North Dissington* property (of which *Edward Collingwood* was then tenant for life in possession).

By the marriage settlement, which bore date the 6th of September, 1820, and recited the will under which the manor of *North Dissington* was devised, the £10,627 7*s.* 6*d.* and £2115 9*s.* 4*d.* (Miss *Calcraft's* fortune) were assigned to trustees upon trust out of the dividends to pay the yearly sum of £100 to the wife, during the joint lives of herself and husband, for her separate use, without anticipation, and, subject thereto, to pay the residue thereof (or, if the wife should pre-decease him, the whole of the dividends) to the husband for his life, and after his death, if the wife should survive him, to her for her life; and after the death of the survivor, "upon trust that if there should be any child or children of the said marriage other than and except an eldest, second, or only son for the time being entitled under the said will to the said manor and other hereditaments at *North Dissington*, and other the estates therewith devised, or the principal part thereof, for an estate in tail male in possession or remainder immediately expectant on the decease of the said *Edward Collingwood*, party thereto, and also other than and except an eldest or only son for the time being entitled to the several estates and hereditaments comprised in the marriage settlement of Mr. and Mrs. *Stanhope*, or the principal part thereof, for any estate of freehold or inheritance in possession or remainder immediately expectant on the decease of the said *Edward Collingwood*, the trustees should transfer the several sums of £10,627 7*s.* 6*d.* 3 per Cent. Consols, and £2115 9*s.* 4*d.* 4 per Cent. Bank Annuities, and each of them, to, between, or among such child or children other than and besides such eldest, second, or only son, entitled as aforesaid, and the issue of any of the same child or children who should depart this life in the lifetime of the said *Edward Collingwood* and *Arabella Calcraft*, or the survivor of them, leaving issue then living;" the same to become vested in such child or children and other issue respectively, other than and besides such eldest, second, or only son, entitled as aforesaid, and to be transferred to them respectively at such age or respective ages, in such manner, if more than one in such shares and proportions, as the husband and wife should, by deed, jointly direct or appoint; and,

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in default of such joint appointment, or so far as the same, if incomplete, should not extend, then as the survivor of them should, by deed or will, appoint; and for want of any such direction or appointment, or so far as the same, if incomplete, should not extend, to or among such child or children other than and besides such eldest, second, or only son entitled as aforesaid, in manner following, that is to say, if there should be but one such child (other than and besides as aforesaid) the said sums of £10,627 7*s.* 6*d.* and £2115 9*s.* 4*d.* to vest in such only child, being a son, at twenty-one, or being a daughter, at that age or marriage, and be transferred to him or her at the same age or time, if the same should happen after the death of the survivor of husband and wife, but if the same should happen in the lifetime of them, or of the survivor, then immediately after the death of such survivor. In case of two or more children other than and besides such eldest, second, or only son, entitled as aforesaid, then the trust funds were to vest in and be transferred to such two or more children in equal shares; the shares of sons to vest at twenty-one, and of daughters at that age or marriage, the provision as to transfer being the same as that already expressed concerning an only child entitled.

No child taking any part of the trust funds under any appointment by husband and wife, or the survivor, was to be entitled to any further share of the trust funds remaining unappointed until the other child or children (other than an eldest, second, or only son, entitled as aforesaid), should have become entitled to a share or shares therein equal in value to the share or shares to be appointed as aforesaid.

In case there should be more than one child for whom portions were intended to be thereby provided, and any one or more of them should die, or, being a younger son, or sons, should become an eldest, second, or only son, entitled as aforesaid, before he, she, or they should acquire a vested interest in the trust funds under or by virtue of the powers or trusts thereinbefore contained, or any of them, then as well the original share intended to be thereby provided for as the share or shares by virtue of this clause surviving or accruing to each and every such child so dying, or such son becoming an eldest, second, or only son, entitled as aforesaid, or so much thereof as should not have been applied by way of advance-

ment, was to vest in, accrue, and belong to the survivor and survivors, and other or others of such children (other than and besides such eldest, second, or only son, entitled as aforesaid), in equal shares, if more than one, at and in the same time and manner as had been provided concerning his, her, or their original share or shares of and in such trust funds.

The trusts with regard to the proceeds of the policies of insurance, so far as the children were concerned, were identical with those already provided with regard to the £10,627 7*s.* 6*d.* and £2115 9*s.* 4*d.*

Mrs. *Collingwood* died in June, 1840, leaving her husband and three children, *Edward*, *Arabella*, and *Cecil* (a girl), her surviving; *Edward Collingwood*, the son, attained twenty-one in 1844, and in 1846 he, with the consent and concurrence of his father, *Edward Collingwood*, as protector of the settlement, barred the estate in tail male in the *North Dissington* estate, then vested in him under the limitations contained in the will.

The estate was thereupon settled to such uses as *Edward Collingwood* and *Edward Collingwood*, the son, should jointly appoint, and, subject thereto, to the use and intent that *Edward Collingwood*, the son, should, during the joint lives of himself and his father, receive a rent-charge of £500 a year out of the estate, and, subject thereto, to the use of *Edward Collingwood* for life, by way of restoration of his former life estate therein; with remainder to preserve contingent remainders, with remainder to the use of *Edward Collingwood*, the son, for life, with remainder to preserve contingent remainders, with remainder to the use of the first and other sons of *Edward Collingwood*, the son, in tail general, with remainders over, the ultimate limitation being to the use of the right heirs of *Edward Collingwood*, the son.

In August, 1855, a term of 1000 years was created in the *North Dissington* property, for the purpose of raising £6500, which had been advanced to *Edward Collingwood*, the son, by his father, an ultimate remainder in fee to the right heirs of *Edward Collingwood* being substituted for that limited by the disentailing deed to the right heirs of *Edward Collingwood* the son.

No appointment was made of the personal estate during the lifetime of Mrs. *Collingwood*, under the joint power of appointment

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reserved to herself and her husband by the settlement; but in April, 1856, a moiety of the trust funds (then £10,627 7*s.* 6*d.* and £2115 9*s.* 4*d.*, and the £15,000 assured by the policies of assurance) was appointed by Mr. *Collingwood* to his daughter *Arabella* on her marriage.

Edward Collingwood died in September, 1866.

Edward Collingwood, the son, thereupon claimed to be entitled equally with his sister *Cecil* in the unappointed moiety of the trust funds, on the ground that he was not then entitled to the *North Dissington* property for an estate in tail male in possession or remainder, and consequently was not affected by the excluding clause.

Miss *Collingwood*, on the other hand, claimed to be absolutely entitled to the whole of the unappointed moiety of the trust funds.

The bill was filed by the trustees for the purpose of determining the rights of the parties.

Mr. *Willcock*, Q.C., and Mr. *Nalder*, for the Plaintiffs.

Mr. *G. M. Giffard*, Q.C., and Mr. *Martineau*, for *Edward Collingwood*:—

The time for ascertaining the children entitled in default of appointment to share in the trust funds, is the period at which such funds become divisible, viz., on the death of the survivor of the two parents: *Sandeman* v. *Mackenzie* (1); *Ellison* v. *Thomas* (2); and the clause of exclusion must be construed by the interest of the eldest son in the *North Dissington* property at that period, and not on his attaining twenty-one.

The clause of exclusion must be construed strictly, and unless *Edward Collingwood*, the son, is in the same identical position with regard to the *North Dissington* property as is pointed out by that clause, he cannot be excluded from an interest in the unappointed trust funds: *Fazakerly* v. *Ford* (3); *Harrison* v. *Round* (4). At the death of his father (the survivor of the two parents) he was not "entitled under the said will to the manor of

(1) 1 J. & H. 613. 7 Jur. N.S. 231.
(2) 1 D. J. & S. 18. 8 Jur. N.S. 1139.
(3) 4 Sim. 390.
(4) 2 D. M. & G. 190. 17 Jur. 563.

North Dissington, or the principal part thereof, for an estate in tail male in possession or remainder immediately expectant on the decease of" his father, and the mere circumstance that he has, during his father's lifetime, dealt with his interest in remainder and derived some benefit from it, is not sufficient to bring him within the description of a person to be excluded.

Mr. *Pearson*, Q.C., and Mr. *Cates*, for *Cecil Collingwood*:—

There being no appointment, *Edward Collingwood* can only take under the gift in default of appointment, and must bring himself within the terms of the gift. The share, if it vested at all, must have vested at twenty-one, and he must then have been excluded because no share had vested in him. These clauses, and the proviso for the accruer of the share of a younger son dying or becoming an eldest son, entitled to the estate before attaining twenty-one, shew that the period of vesting is to determine who is to take and who to be excluded: *Windham* v. *Graham* (1). This is made more plain by the introduction of the words "in remainder" in the description of the person to be excluded; for inasmuch as the portions were only divisible after the death of the survivor of the father and mother, if the words "for the time being" referred to that period, the estate in tail male immediately expectant on the father's decease must have been an estate in possession, and the words "in remainder" would be superfluous, but if our contention be the correct one, those words were necessary, because at the time fixed for the vesting of the portions, the father might be living or dead.

[Mr. *Giffard*:—Those words "in remainder" were in *Ellison* v. *Thomas* (2).]

Yes; but there they were necessary, as there was another tenant for life, *Thomas Fry*, whose life estate overrode the limitations of the settlement, and who was, in fact, living at the death of *R. E. Cresswell*, the father. *Ellison* v. *Thomas* was not a question of this kind. *Edward Collingwood*, the son, is in possession of the family estate, and if not of the precise estate intended for him, it is by

(1) 1 Russ. 331. (2) 1 D. J. & S. 18.

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his own act, and he has had an equivalent for what he has not got. The natural justice of the case is with our client.

SIR W. PAGE WOOD, V.C.:—

Upon looking into the authorities it seems to me extremely difficult to hold other than this, that the time for ascertaining whether a particular child is to be excluded, is the time when the fund becomes divisible. In *Windham* v. *Graham* (1), which I have carefully considered, the learned Judge who decided it (Lord *Gifford*) thought that the intention was so strongly expressed as to enable him to come to the conclusion that the period of vesting was the time to be considered, in ascertaining who were to be excluded from the portion. The rule, undoubtedly, has been extremely strong against excluding any child, on the one hand, who did not take the family estate, and, on the other hand, against admitting any one who did take it; and this doctrine has been carried to a very great length. An interest has been vested by appointment, and that appointment has been held to be an appointment on condition that the child shall not have attained a given age (2). Perhaps that is the strongest instance to be given of the construction that the period of division and not that of vesting is the criterion. So far as to the first point, viz., the period when the children to take are to be ascertained, the case, apart from the clause of accruer, falls within the authorities. The settlement says, that the persons to take in default of appointment are to be all the children "other than or except an eldest, second, or only son, for the time being entitled under the said will to the said manor and other hereditaments at *North Dissington*, and other the estates therewith devised, or the principal part thereof, for an estate in tail male in possession or remainder immediately expectant on the decease of the said *Edward Collingwood*, party thereto, and also other than and except an eldest or only son for the time being entitled to the several estates and hereditaments" comprised in another settlement which does not appear to be in question in this suit. No doubt a difficulty arises, as was suggested to me by Mr. *Cates* in his argument, by the use

(1) 1 Russ. 331.

(2) *Matthews* v. *Paul*, 3 Sw. 328, 340.

of the words "in remainder expectant immediately on the decease." There is a sense, however, in which they might be perfectly intelligible. The father might give up his life interest in the estate after the death of the mother, and the life interest being given up, and the children being all of age, the provision might be acted upon. It is sufficient, I think, to say that those words would not be idle surplusage if the ordinary construction were adhered to. [His Honour, after adverting to some of the arguments urged against the claim of *Edward Collingwood*, based on the clause of accruer, and referring to the case of *Ellison* v. *Thomas* (1), continued :—]

One is driven back, as it seems to me, to rest upon that which is the rule of the Court, and the only conclusion which one can come to upon the rule is, that inasmuch as double portions are to be avoided on the one hand, and only one person is to be excluded on the other, it is the period of division that must be looked to in order to ascertain who is entitled or excluded.

The second point is, to a certain extent, new, although the principle, I think, must be the same as that which has been decided to be the rule in the case of shifting clauses. It is, no doubt, the intention to provide for all except that child, who is provided for by being put into possession of the estate. Suppose the necessities of the father have been such that the son, when he becomes of age, charges his estate in order to pay his father's debts. Could it be said that he was a child who had forfeited his claim to the portion in consequence of his having had a share in the hereditaments now disposed of? They are all gone, and you could not predicate of that child that he was entitled at the time of division to the family estate. I think, therefore, the only true rule which one can adopt is to look at the expressions used, and see what it is that constitutes the possession of the eldest son, following the old rule, which says, that one is to see if he has the family estates. He must, I apprehend, have the family estates, or the principal parts thereof, in possession or remainder immediately expectant on the death of *Edward Collingwood*. In this case, for certain reasons, the father and the son concur in a re-settlement, the son being put into possession of certain provisions during his father's lifetime; and the father

(1) 1 D. J. & S. 18.

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having the control over the whole of the fund to be appointed. The father and the mother during their joint lives, and the father or the mother after the death of either one of them, can by appointment make everything just and equitable, with reference to the arrangement which he or they may think fit to make. That being so, assuming, as I do of course, that if he was an excluded child the father has no power to appoint it to him on the assumption that he ought not to be excluded, yet if he should not be found in the precise position which the settlement points out at the period of distribution, then I say no such hardship arises in the son's having the benefit of the estate, or the other advantages derived from it in his lifetime, and also in having the portion, because the parents have ample means of setting all that right. There is, I apprehend, no objection to the rule being applied here, for the reasons I have assigned, viz., that the parents would have complete power of re-arranging everything that was apparently inconsistent with the true scope of the instrument. I must assume the father to have known that, by dealing with the estate in the way he did, he placed his son out of the excluded list, and put him in the included list, and, having done so, it left him to deal with the property as he thought fit, and he not having dealt with it, the unappointed portion goes to his son, who is no longer an excluded child.

I must, therefore, declare that the unappointed portion is to be divided in equal shares between *Edward* and *Cecil Collingwood.*

Solicitors: Messrs. *Coverdale & Co.;* Messrs. *Bischoff, Coxe, & Bompas.*

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1867
June 27, 28.

Administration—Personal Assets—Life Tenant of Residue—Adjustment of Accounts between Tenant for Life and Remainderman—Income of Legacies until payment—Income of Contingent Legacies.

Where a testator has bequeathed legacies, and given his residue to a tenant for life, with remainder over; executors, though, as between themselves and the persons interested in the residue, they are at liberty to have recourse to any funds they please in order to pay debts and legacies, yet will be treated by the Court, in adjusting the accounts between tenant for life and remainderman, as having paid the debts and legacies not out of capital only, nor out of income only, but with such portion of the capital as, together with the income of that portion for one year, was sufficient for the purpose.

Testator *A.*, having bequeathed legacies, which his estate was amply sufficient to pay, gave the residue of his estate to *B.* absolutely. *B.* died within six months after the death of *A.*, having by his will bequeathed legacies, and given the residue of his estate to a tenant for life, with remainder over. *B.*'s personal estate, other than that bequeathed to him by *A.*, was insignificant in amount:—

Held, that whatever remained of *A.*'s estate, after taking such portion of the capital as, together with the income of such portion for one year, was required to pay *A.*'s debts and legacies, became the property of *B.*; and that the tenant for life was entitled from the death of *B.* to the income of the residue of *B.*'s estate, after deducting such portion of the capital as, together with the income of such portion for one year, was required to pay *B.*'s debts and legacies:

Held, further, that he was entitled to the income of such portion of *B.*'s residue as was in a proper state of investment, *in specie*; and as to the rest, of so much consols as would have been produced by conversion at *B.*'s death.

B. gave some legacies to legatees, contingent on their attaining twenty-one:—

Held, that the tenant for life was entitled to the intermediate income of the fund set apart to meet the contingent legacies.

JOSHUA FIELD, by his will, dated the 10th of July, 1858, bequeathed a number of legacies, and proceeded as follows:—

"I direct that all legacies given by this my will, unless I have otherwise directed, shall be payable at the end of one year from my death, or bear interest from the end of such year at the rate of £4 per centum per annum, except the legacy to the *Royal Hospital*, which I direct to be paid as soon as conveniently can be after my decease. But in case my executors shall think it

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right, out of regard to any liability attaching to them by reason of my proprietorship of any share in a joint stock banking company, to defer the payment of the capital of all or any of such legacies for a period not exceeding three years from my death, they shall be at liberty to do so."

Subject to the payments of his debts, funeral and testamentary expenses, and legacies, the testator devised and bequeathed all the residue of his real and personal estate and effects whatsoever and wheresoever, not thereinbefore otherwise disposed of, to the use of *Eugene Thomas Curzon Whittell*, his heirs, executors and administrators.

By two codicils to his will, the testator bequeathed other legacies, the total amount of legacies bequeathed by the will and codicils being £183,870. The testator *Field* died on the 2nd of May, 1863, and his estate was sworn under £250,000.

Eugene Thomas Curzon Whittell died on the 4th of September in the same year, having by will, dated the 15th of June, 1863, bequeathed a number of legacies, three of them being made contingent on the legatees attaining the age of twenty-one, and having devised and bequeathed the residue of his real estate, and also of his personal estate, after payment of debts, funeral and testamentary expenses, and the legacies thereinbefore bequeathed, to the Plaintiffs, *Charles Henry Christian Allhusen* and *Charles Wilkin*, their heirs, executors, administrators, and assigns, upon trust to sell and convert, and to invest the clear moneys, after payment of all incidental expenses, in the names of his trustees for the time being, in certain specified classes of investments, with the following proviso:—

"Provided always, and I do hereby declare, that it shall be lawful for my said trustees or trustee to allow any part or parts of my personal estate, whether invested in my own name at my decease, or transferred to my executors or trustees as part or on account of the personal estate and property bequeathed to me by the will of my late great uncle, *Joshua Field*, to remain, either permanently, or for such period or periods as my said trustees or trustee shall think proper, in the state or respective states of investment in which such part or parts shall exist at, or be trans-

ferred after, my decease as aforesaid, without being responsible for any loss to arise thereby."

He then declared the trusts of the fund to be, to pay the income, including the rents of his real and leasehold estates thereinbefore devised and bequeathed, until sale, to his father, *Joshua Francis Whittell*, or his assigns, during his life; and after his decease, upon certain trusts for the benefit of his (the testator's) sisters, and their husbands and children, in equal fourths.

The testator *Field's* assets at the time of his death consisted of some fifteen different items of investment, besides cash in the house, and at the bankers. All the above items were carrying interest. In the interval between *Field's* death and *Whittell's*, *Field's* executors sold parts of the property to pay debts and expenses. The rest was, at *Whittell's* death, standing in their names, and they had also a sum of cash in hand, which alone did not carry interest.

The testator *Whittell's* personal estate (other than that derived from *Field*) was very small.

In the interval between *Whittell's* death and the 2nd of May, 1864 (one year after *Field's* death), *Field's* executors, in order to pay his legacies, sold some other parts of his estate which up to that time had been bearing interest. They afterwards sold other portions for the same purpose. The unsold part of *Field's* assets were at different times transferred into the names of *Whittell's* executors.

The executors of *Whittell's* will had set apart £8127 14*s.* 3*d.* consols to meet the contingent legacies.

Questions having arisen, the bill was filed, in February, 1865, by the trustees of *Whittell's* will against the tenant for life of his residue, and the persons interested in remainder, for administration.

The Defendant, *Joshua F. Whittell*, as legatee for life of the residue claimed: 1. The whole (or, where apportionable, a proportionate part) of the income received by the executors of *Field* after *Whittell's* death, on such of the securities representing *Field's* estate at *Whittell's* death, as were sold to pay *Field's* legacies. 2. The whole, or an apportioned part, of the income received after *Whittell's* death on the securities which, as representing the residue

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of *Field's* estate, had been transferred or paid over to the Plaintiffs. 3. The whole, or an apportioned part, of the income which accrued due after *Whittell's* death on the fund set apart to meet the contingent legacies.

The persons interested in remainder in the residue of *Whittell's* estate contended that *Joshua F. Whittell* was not entitled to any income from the securities representing *Field's* estate before they were transferred to the Plaintiffs, nor to any income except the income of what remained after payment of debts and legacies. They also contended that the income of the sum set apart to meet the contingent legacies formed part of the capital of the residue.

By a decree, on the 22nd of July, 1865, besides the ordinary accounts and inquiries as to the testator *Whittell's* estate, the following inquiry was directed:—What the testator *Field's* estate consisted of at *Whittell's* death, and what parts were then producing income; and what income accrued therefrom from *Whittell's* death before the ultimate residue of *Field's* estate was transferred to the Plaintiffs, distinguishing such part of the income as arose from that part of the estate which was applied in payment of legacies, from the rest.

In answer to this inquiry, the Chief Clerk had found that the income accrued upon *Field's* estate from the death of *Whittell* to the period of transfer to the Plaintiffs, consisted of various sums, amounting to £8675 6*s.* 9*d.*, and that of this sum £6,389 19*s.* 5*d.* arose from such portion as was applied in payment of *Field's* legacies, the balance of £2285 7*s.* 4*d.* being due to those portions which were transferred over.

He also found that no part of the testator *Whittell's* personal estate was "invested in his own name at his decease;" that such parts of his personal estate as were transferred to his executors as part of *Field's* estate had been "allowed to remain permanently invested" (except as to part of a sum of £40,000 stock which had been sold); and that if the clear residue of *Whittell's* estate (other than that part which had been allowed to remain in its state of investment), and interest on such clear residue for twelve months after the testator's death, had been invested in consols at the end of twelve months after *Whittell's* death, the dividends for one year would have amounted to £480 19*s.* 4*d.*

Mr. *Willcock*, Q.C., and Mr. *W. W. Cooper*, for the Plaintiffs.

Mr. *Amphlett*, Q.C., and Mr. *Everitt*, for the Defendant, *Joshua Francis Whittell*:—

If a tenant for life of residue be entitled (as we say he is) to the income of a fund set apart to meet a contingent legacy, what difference can there be in principle between that and the income of a vested legacy? The decision in *Holgate* v. *Jennings* (1) is opposed to the stream of authorities, and cannot be maintained on principle.

[Mr. *Mackeson* referred to *Amphlett* v. *Parke* (2).]

[THE VICE-CHANCELLOR thought the tenant for life could not claim the income of that part of *Field's* estate which was sold to pay debts and legacies.]

We claim, then, the income on all the rest from the date of *Whittell's* death: *Angerstein* v. *Martin* (3); *Hewitt* v. *Morris* (4).

[THE VICE-CHANCELLOR referred to *Macpherson* v. *Macpherson* (5).]

As to the interest of the fund set apart to meet the contingent legacies, that is settled by authority: *Crawley* v. *Crawley* (6); *Fullerton* v. *Martin* (7); *Cranley* v. *Dixon* (8).

Mr. *W. M. James*, Q.C., and Mr. *W. W. Mackeson*, for some of the remaindermen:—

The contention, on behalf of the Defendant *Whittell*, is as if he were tenant for life of *Field's* estate, instead of being tenant for life of *Whittell's*. Up to the period of transfer and payment over by *Field's* executors, principal and income are all capital together. It cannot be said that *Field's* executors have neglected their duty, even if their neglect could make any difference. They paid his debts and his legacies, and transferred and paid over what was not wanted. To the income of the securities so transferred over, Mr. *Whittell*, is, of course, entitled. As to the sums paid over,

(1) 24 Beav. 623.
(2) 1 Sim. 275; 4 Russ. 75.
(3) T. & R. 232.
(4) Ibid. 241.
(5) 1 Macq. 243; 16 Jur. 847.
(6) 7 Sim. 427.
(7) 1 Dr. & Sm. 31.
(8) 23 Beav. 512.

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whether arising from principal or income, they became, in the hands of *Whittell's* executors, capital; and we maintain that upon them alone (besides the transferred securities) the Defendant is entitled to income.

It must be conceded that the Defendant is entitled for the first year, in lieu of actual income, to the income of so much consols as *Whittell's* residue (except those parts that were allowed to remain in their actual state of investment) would have produced one year after his death, namely, £480 19*s.* 4*d.*, on the principle of *Dimes* v. *Scott* (1); *Morgan* v. *Morgan* (2).

What we contend is, that the tenant for life is entitled to the interest on the permanent investments, together with the £480 19*s.* 4*d.*, and nothing more.

As to a contingent legacy, it is plain that if the contingency does not happen, the fund will become residue, and the payment of the intermediate income will have been proper; but if the contingency happens, the fund will be wanted, and never having formed residue, the tenant for life will have received something under the name of income, where there was no capital: *Morgan* v. *Morgan* (3); *Roper* on Legacies (4), citing *Harris* v. *Lloyd* (5); *Leake* v. *Robinson* (6).

Mr. *Caldecott*, for an ultimate remainderman, and one of the contingent legatees:—

The question is, what is residue? We contend that nothing is residue until it reaches the hand of the executor. There can be no gift of income of what may not hereafter come to the executor's hands.

As to the income of the fund set apart for contingent legacies, *Cranley* v. *Dixon* (7) and *Fullerton* v. *Martin* (8) have no application; because in those cases there was a specific fund set apart, to be held upon certain terms. The question is, is this residuary capital, or residuary income? We say it was made income by the testator before it fell into the residue. In *Crawley* v. *Crawley* (9) the legacy

(1) 4 Russ. 195.
(2) 14 Beav. 72.
(3) 4 De G. & Sm. 164.
(4) Vol. ii. p. 1309.
(5) T. & R. 310, 314.
(6) 2 Mer. 363, 384.
(7) 23 Beav. 512.
(8) 1 Dr. & Sm. 31.
(9) 7 Sim. 427.

given to the testatrix's grandnephew was, in the event of his not attaining twenty-five, to fall into the residue. No such provision occurred with regard to the other contingent legacies, and the expression in one case may have led to the presumption of absence of intention in the other.

The VICE-CHANCELLOR said he thought the question as to the contingent legacies was governed by authority.

Mr. *Amphlett*, in reply:—

The Court does not look at what the executors have actually done, but to what they might have done. These executors might have transferred all these funds in the testator *Whittell's* lifetime, and then the case would have been clear.

June 28. Sir W. PAGE WOOD, V.C.:—

The question in this case has been repeatedly before the Court, and both the points are, in my opinion, concluded by authority; but I must say I have found some difficulty in penning the exact order which ought to be made.

The question arises in this way. There are two testators. The first, whose name was *Field*, gave his property to the second testator, *Whittell*. *Field's* estate was very large, and after the payment of his debts and legacies, which, as far as the executors were concerned, they were at liberty to pay in any manner they pleased, there remained a very considerable surplus *in specie*, which was handed over to the executors of *Whittell*. *Whittell* died in less than six months after the death of *Field*, and that circumstance has created some embarrassment.

Before the property of *Field* passed over to *Whittell's* executors, a large proportion of what had been received by the executors of *Field* consisted of income which had accrued due after the death of *Whittell*. Of course, up to the death of *Whittell*, the whole of *Field's* estate was capital coming to his (*Whittell's*) estate; and there is no necessity for distinguishing between capital and income, as to anything accruing due between the death of *Field* and the death

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of *Whittell*, as was conceded very properly in the argument. But after the death of *Whittell*, the whole of *Field's* estate, whatever it might be, would come to his executors. All that was not wanted when *Field's* assets had been administered, and his debts and legacies paid, would be the property of *Whittell*; and any income arising from the estate, so far as it was not wanted for the payment of *Whittell's* debts and legacies, would be income payable to the tenant for life.

The question has been somewhat confused in consequence of the argument which has arisen on the form of the certificate; there having been a direction to find out how much income has accrued from *Field's* estate since *Whittell's* death, and how much of that income was derivable from capital which was not wanted for the payment of *Field's* debts and legacies, and how much from that which was so wanted.

I think we must confine ourselves entirely to *Whittell's* estate, and fasten our minds entirely upon that. We have to ascertain *Whittell's* assets, including, of course, in that inquiry, what were those assets at the death of *Field*. Now executors are not bound to hold their hands from taking any fund which may be coming to them for the purpose of paying debts; they are not bound to attend to the sources of income as between the persons who may have successive rights in the property. But the Court, whenever the debts have been paid, either of the one testator or the other, will take care that the accounts shall be modelled in such a way as to do justice to all persons who may be interested in the estate.

There appear to be two points well covered by authority. One is, that every tenant for life of residue is entitled to the income of all such part of the residue as is not required for the payment of debts, and which is found to be in a proper state of investment. He is entitled to the income of that property from the death of the testator. There have been numerous decisions on this point, some of the earliest being those of *Angerstein* v. *Martin* (1), and *Hewitt* v. *Morris* (2). These authorities clearly shew that, supposing a testator has a large sum, say £50,000 or £60,000, in the funds, and has only £10,000 worth of debts, the executors will be justified, as

(1) T. & R. 232. (2) T. & R. 241.

between themselves and the whole body of persons interested in the estate, in dealing with it as they think best in the administration. But the executors, when they have dealt with the estate, will be taken by the Court as having applied in payment of debts such a portion of the fund as, together with the income of that portion for one year, was necessary for the payment of the debts. It is curious that I find none of the authorities pointing out this rule, but probably it has never been thought necessary to make so nice a distinction. It is quite clear that the executors must not be taken to have applied the whole income. Until the debts and legacies were paid, there would have been no interest from the death of the testator which could by possibility have come to the tenant for life. What I apprehend to be the true principle is, that, in the bookkeeping which the Court enters upon for the purpose of adjusting the rights between the parties, it is necessary to ascertain what part, together with the income of such part for a year, will be wanted for the payment of debts, legacies, and other charges, during the year; and the proper and necessary fund must be ascertained by including the income for one year which may arise upon the fund which may be so wanted. I have not been able to find a case in which that calculation has been made, but it appears to me to be the principle upon which alone the rights can be adjusted. It is clear that the tenant for life ought not to have the income arising from what is wanted for the payment of debts, because that never becomes residue in any way whatever.

That being so, it occurs to me that the only way in which I can arrive at the correct mode of taking this account between all parties is, to direct the further inquiries, and make the declarations which I will presently read.

As regards the contingent legacies, there is a great deal of force in the argument that if these legacies become payable, they are, like any other legacies, no longer residue; and being no longer residue, the tenant for life ought not, upon principle, to be entitled to the income of the fund set apart to meet them, any more than to the income of any other part of the fund which may be necessary for the payment of any other legacy. I am not sure that the Courts, in some of the authorities cited, have sufficiently adverted to this reasoning; and whether they have not too narrowly followed

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words rather than things, when they said that this income is income of residue; because when it comes to be taken out it is no longer residue. However, I think I am bound by authority, and, upon principle, I consider the question as analogous to the cases, like *Sitwell* v. *Bernard* (1) and others, where the Court has been obliged, for the sake of not deferring to inconvenient periods the distribution of property, as it were to intervene, and cut the knot. I apprehend the principle may be rested upon this, that the fund is residue until it is wanted; and if it be said that it ceases to be residue when it is not wanted, that rule may be a very simple one in one case, and a very complicated one in another. The income may go on being paid for a long time, and the tenant for life may die before the right can be ascertained either one way or the other. The Court has, therefore, thought fit to have regard to this possible delay, upon the same principle as in certain cases where persons are entitled to property, it will not allow after-born children to be considered, because it desires to distribute the estate. [His Honour then directed the following inquiries, and made the following declarations:—]

1. What amount of capital was required for payment of the testator *Field's* funeral and testamentary expenses, debts, and legacies, including all income for one year on the amount of capital to be ascertained as necessary for such payment.

2. What amount of capital was in like manner required for payment of the funeral and testamentary expenses, debts, and legacies, of the testator *Whittell*, but not including the contingent legacies.

Declare the surplus capital of *Field's* estate, subject to the first inquiry, to be capital of *Whittell's* estate.

As to the surplus of *Whittell's* estate after the second inquiry, including in such estate the capital coming from *Field's* estate, declare Defendant *Whittell*, the father, as tenant for life, entitled to the income thereof from the death of *Whittell*; such surplus, so far as it was not in an actual state of investment, to be taken as invested in consols at the death of *Whittell*.

Declare the tenant for life entitled to the income arising from

(1) 6 Ves. 520.

so much of *Whittell's* residuary estate as may be set apart for payment of the contingent legacies.

The Chief Clerk to certify the amount due to the tenant for life, with liberty to apply at Chambers for payment.

V.-C. W. 1867 ALLHUSEN *v.* WHITTELL.

Solicitor for the Plaintiffs: Mr. *C. Wilkin.*
Solicitors for the Defendants: Mr. *C. Evans;* Mr. *Lefroy.*

BOYD *v.* BOYD.

V.-C. W. 1867 *July* 1, 3.

Intestacy—Statute of Distribution—Advances within the 22 & 23 *Car.* 2, *c.* 10, *s.* 5.

Any sum of considerable amount paid out of the common fund of a family, to or for the benefit of a child, is an "advance" within the meaning of the *Statute of Distribution;* the intention of the statute being to make the provision for all the children equal.

A premium paid upon the occasion of a son being articled to an attorney and solicitor *held* an advance to the son, though the profession was afterwards relinquished.

A sum paid for the purchase of a commission in the army for a son *held* an advance; but whether the sum paid for the outfit of a son on entering the army is an advance, *quære?*

Sums paid by a father to a son to enable him to pay debts of honour, the non-payment of which would have compelled him to leave the army, *held* advances.

THE question in this cause, upon further consideration, was, whether certain sums paid by an intestate to or on behalf of one of his sons, who died in his lifetime, were to be considered advances within the meaning of the *Statute of Distribution,* 22 & 23 Car. 2, c. 10, s. 5.

These sums were the following: 1. £420 paid for premium to a solicitor on the son being articled to him as an attorney and solicitor, and £121 15*s.* for stamps and expenses thereon. 2. £840 for the purchase of a cornetcy in the 14th Dragoons (the son having relinquished the former profession), with £138 11*s.* for outfit, and £150 for horses; and 3. Payments amounting in the aggregate to £2,000, remitted to the son's account at *Cox's,* in seven items, varying in amount from £50 to £550, at different

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dates during the years 1851 and 1853, in order to enable the son to discharge certain debts, being, as appeared from the evidence, debts of honour for money lost at billiards. The son married in 1850. It was shewn that the income of the intestate during 1851 and 1852 was about £8000 a year, although the amount to be distributed amongst the next of kin (seven shares) was under £15,000.

Mr. *Kay*, Q.C., and Mr. *Parke*, for the Plaintiff, one of the next of kin:—

The payments may be arranged in three classes: First, the premium and commission; second, the outfit; and third, the debts.

It is clear that small inconsiderable sums given to a child, such as maintenance money, an allowance to a son at the University, or for travelling expenses, are not advances. But large considerable sums will be so treated.

A commission in the army is held a provision: *Lord Kircudbright* v. *Lady Kircudbright* (1). The same principle will apply to the premium.

The outfit is a necessary accompaniment to the commission.

As to the debts, they were sums which were necessary to be paid, in order to enable the son to retain his position in the army. Payment of them was forced upon the father. In *Auster* v. *Powell* (2), Lord *Westbury* considered that sums paid by a testator to a bank in discharge of the debt of his son-in-law, were advances within the meaning of his will.

Mr. *S. Thompson*, for the widow.

Mr. *G. M. Giffard*, Q.C., and Mr. *Wolstenholme*, for another party in the same interest:—

The commission and annuity are covered by authority.

The outfit was part of the stock of the family, appropriated to the advancement of one of its members.

As to the debts, if they had been small, it might have been otherwise. But if a son has large expectations, the very thing a

(1) 8 Ves. 51. (2) 1 D. J. & S. 99, 106.

testator would desire to do would be to deduct the sums expended in rescuing a son from a position which would involve his having to leave the army.

Mr. *J. W. Chitty*, for another party in the same interest.

Mr. *Willcock*, Q.C., and Mr. *Street*, for the Defendants, the only children of the deceased son:—

As to the premium paid to the solicitor, it was not a large sum; and it was, in the result, thrown away. This cannot be an advance. Besides, it is admitted that maintenance is not an advance; and in the older authorities education was what was meant by maintenance.

As to the outfit, it could not be an advance. The whole subject matter wasted and wore out. Would jewelry given by a father to his daughter on her marriage, or the sum spent in giving the wedding breakfast, be an advance?

Such gifts must be considered as presents, as were also the sums paid to discharge the son's debts. Circumstances may shew that a large sum may be a present, and a small one an advance.

The amount of the intestate's income, £8000 a year, as compared with the smallness of the sum to be distributed, is a presumption against the intention to advance the son.

Mr. *Kay*, in reply.

July 3. SIR W. PAGE WOOD, V.C., after stating the particulars of the case, continued:—

As regards the premium, stamp, and expenses, upon the son being articled to a solicitor, they are clearly advances within the statute. There are several decisions to that effect. The only *dictum* to the contrary is to be found in a note to the case of *Pusey* v. *Desbouvrie* (1), where it is stated that "putting out a child apprentice is no part of his advancement, for it is only procuring the master to keep him for seven years instead of the

(1) 3 P. Wms. 317, n.

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parent." But that was said with reference to the custom of *London*, which custom, like those of many of our old municipalities, is derived from the Roman law.

Upon the whole, these sums are unquestionably an advancement, and the circumstance that the son afterwards gave up the profession of an attorney, can make no difference, the principle of the statute being, the necessity of preserving equality amongst the children.

That question is gone into at great length in the case of *Edwards* v. *Freeman* (1), which was decided by Lord Chancellor *King*, with the assistance of the Lord Chief Justice *Raymond*, Sir *Joseph Jekyll*, M.R., and Mr. Justice *Price*, after an elaborate argument. There the Lord Chancellor said, with reference to the question as to whether future contingent provisions for children are to be brought into hotchpot: "The occasion of making this statute was to put an end to the controversy between the temporal and spiritual Courts; and the Act intended to make the children's provision equal." In a previous case of *Holt* v. *Frederick* (2), the same Lord Chancellor *King* had observed that the *Act of Distribution* "was grounded on the custom of *London*," and in this case (3) he repeats the observation.

Now, if there be an advance out of the common fund (if I may call it so) of the family, in order to put a son into a profession, and the son afterwards changes his mind and relinquishes that profession, whether that sum of money be profitably advanced or otherwise, it has been taken out of the common stock of the family. The word "portion" in the statute cannot be confined to portions under a marriage settlement, or the like; it has been held to apply to any sum advanced for the benefit of a child. Then as to the commission in the dragoon regiment, if the son is minded again to dip into the common stock, in order to fit himself out for a new profession, the same principle must apply.

In short, wherever a sum is paid for a particular purpose, which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advance.

(1) 2 P. Wms. 436. (2) 2 P. Wms. 356.
(3) 2 P. Wms. 449.

The payment of the money is the important thing—the Court does not look to the application.

As to the debts, suppose the young man had represented to his father that it was extremely important they should be paid, in order that he might keep his position in the army, and the father had paid these sums in order to assist him, it would have been clearly an advance. If the son had obtained the money ostensibly for some other purpose, and had spent it in payment of his debts, it would have come to the same thing.

I quite agree in the observation that, considering the income of the father, which appears to have been some £8000 a year, the provision ultimately made for his children was very small. But it did not appear that he had any other source from which to make any considerable savings; and accordingly, out of this fund, whatever may have been its amount, all must take equally and rateably.

The question of the outfit it becomes unnecessary for me to consider, because the other sums exhaust the whole of the share.

The declaration will be, that as the above several sums (without prejudice to any question as to the £288 11*s.* for outfit and horses) exhaust the whole share which would otherwise be coming to the children of the deceased son, they are not entitled to take any share in the fund.

Solicitors for the Plaintiff: Messrs. *Parke & Pollock.*

Solicitors for the Defendants and other parties: Messrs. *Domville, Lawrance, & Graham*; Mr. *W. W. Comins.*

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March 2, 6.

BOGG *v.* MIDLAND RAILWAY COMPANY.

Jurisdiction—Declaration of future Right—Lessor and Lessee—Right of Renewal —Railway Company—Lands Clauses Act.

Land, as to which a dispute as to the amount of the lessee's interest was pending (viz. whether he had a right of renewal for sixty-one years from 1885, or whether his interest expired altogether at the end of his existing term of sixty-one years, 1890), was taken by a railway company, under an agreement by which it was provided that if the lessee should substantiate his right of renewal, the company would pay him a further sum (the amount, if in dispute, to be settled by arbitration pursuant to the *Lands Clauses Act*), in addition to the price of the existing term. The company having since bought up the lessor's reversion in fee, the lessee filed a bill against them, praying a declaration of his right to a renewal from 1885, and payment of compensation on that footing:—

Held, on demurrer, that the Court had jurisdiction to decide this question of future right of renewal, on which the lessee's claim to compensation for the land which had been taken out and out wholly depended, and for ascertaining which no means were afforded by the *Lands Clauses Act*.

Demurrer.

The bill prayed a declaration that, according to the true construction of a lease to her testator of the 17th of August, 1829, the Plaintiff was entitled to have a renewed lease of the leasehold property granted to her for a term of sixty-one years from the 24th of June, 1885; and that the Defendants, the *Midland Railway Company* (who had purchased the lessor's reversion) ought to pay to the Plaintiff compensation calculated on the basis of her interest in the property being for a term of eighty-two years at the time when possession was taken, instead of twenty-six years only (as offered by the Defendants).

The bill also prayed that the Defendants might be decreed to pay to the Plaintiff the further sum claimed by her for compensation beyond the amount of compensation already offered by them, or else that such further sum might be settled by arbitration under the provisions of the *Lands Clauses Act*, 1845; and that Defendants might be decreed to take all necessary steps on their part to procure the amount of such further compensation to be settled by arbitration under the Act, and to pay to Plaintiff the amount, Plaintiff offer-

ing to take all necessary steps on her part to procure such amount to be so settled by arbitration.

The lease to *John Bogg*, the Plaintiff's testator, dated the 17th of August, 1829, for sixty-one years from the 24th of June, 1829, contained the following proviso:—

"Provided also, and it is hereby agreed by and between the said *Charles Finch* (lessor), and the said *John Bogg*, and the said *Charles Finch* doth hereby for himself, his heirs and assigns, covenant, promise, and agree, to and with the said *John Bogg*, his executors, administrators, and assigns, that if he, the said *John Bogg*, his executors, administrators, or assigns, shall be minded and desirous to renew this present indenture of lease at the end and expiration of any or every term of fourteen years from the said 24th day of June, 1829, and shall give or leave ten days' notice of such his or their mind and intention to or for the said *Charles Finch*, his heirs or assigns, before the end or expiration of any or every such term of fourteen years, and shall pay to the said *Charles Finch*, his heirs or assigns, the sum of £52 10*s.* for any and every such renewal at the time of the execution of any or every such renewed lease, that then and in such case the said *Charles Finch*, his heirs and assigns, shall grant and execute to the said *John Bogg*, his executors, administrators, or assigns, from time to time, a new lease of the said piece or parcel of ground, messuages, or tenements and premises hereby demised, to bear date the day next after the end or expiration of any or every such term of fourteen years, and to hold the same to the said *John Bogg*, his executors, administrators, or assigns, from the day of the date of any or every such new lease, for the term of sixty-one years from thence next ensuing, and fully to be complete and ended, under and subject only to the same rents, and to the same covenants and conditions, as are contained in this present indenture of lease on the part and on behalf of both parties; and that from and after the granting and executing of any and every such new indenture of lease this present indenture and every other indenture of lease before granted of the said demised premises shall cease, determine, and be utterly void to all intents and purposes whatsoever, anything in this or any such former indenture of lease contained to the contrary thereof in anywise notwithstanding."

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John Bogg died in February, 1839; and the Plaintiff, *Ann Bogg*, was his widow and executrix.

The property comprised in the lease being required by Defendants, the *Midland Railway Company*, for the purposes of their undertaking, the usual notice to treat was, in May, 1864, served on Mrs. *Bogg*. The particulars of claim sent by Mrs. *Bogg* stated:—

"The premises are all held under a lease, dated the 17th of August, 1829, for a term of sixty-one years from the 24th of June, 1829, at an annual rent of £3 10s., with power to renew the lease for a like term of sixty-one years from the year 1885, upon payment of a fine or sum of £50 in the year 1885, thereby giving Mrs. *Bogg* an unexpired term of eighty-two years from the 24th of June last."

The lessor had questioned the right of renewal of the lease from the expiration of that term of fourteen years which will expire in 1885, inasmuch as no notice had been given by *Bogg* or his representatives of a desire to obtain a renewal of the lease previously to the expiration of either of the terms of fourteen years which had already elapsed since the 24th of June, 1829. In consequence of this question the Defendants alleged that they were not bound to pay compensation for an interest of eighty-two years, but only for the interest of the Plaintiff in the residue of the original term of sixty-one years; and as their taking possession was delayed by the pendency of this question, which rendered it impossible to ascertain the amount of compensation under the Act, it was agreed that the Plaintiff should send in an amended claim, shewing how much she claimed: (1.) on the footing of being entitled for the residue of the original term of sixty-one years only (twenty-six years); and (2.) on the footing of being entitled for a term of eighty-two years; and that on payment of the ascertained value of the term for twenty-six years the company should be let into possession, without prejudice to their liability to pay the further amount payable if the interest of the Plaintiff should be determined to be for eighty-two years.

The amount of compensation payable by the company, on the hypothesis that the interest of the Plaintiff was a term of twenty-

six years only, was ascertained by valuation at £1353 8*s.*, and thereupon an agreement was come to by which the company agreed to purchase the leaseholds for the residue of the original term at this price, with a proviso that in the event of the Plaintiff substantiating her right to renewal, a further sum should be paid to her by the company, the amount, if in dispute, to be settled by arbitration, under the *Lands Clauses Act.*

The company were let into possession, but before any steps could be taken by the Plaintiff to substantiate her right to a renewal they purchased the reversion in fee.

Under these circumstances the Plaintiff had filed her bill against the company, praying as above stated.

To this bill the company had filed a demurrer, on the ground 1. that the Court had no jurisdiction to try the question of future right, or to compel an arbitration under the provisions of the *Lands Clauses Act.* 2. On the construction of the covenant that the renewals must be at the end of every fourteen years, and that, by passing over any one period without renewing, the lessee lost his right.

Mr. *G. M. Giffard,* Q.C., and Mr. *Sargant,* for the demurrer:—

On the question of jurisdiction: it is not the province of this Court to compel arbitration under the *Lands Clauses Consolidation Act.* The Plaintiff should proceed by mandamus. She cannot come here to obtain a declaration of a future right until it arises.

On the question of construction: the words "any or every" are to be read together. If the lessee passes one period of renewal without renewing he loses his right. A contrary construction would be unreasonable, for a low rent is reserved on account of the fines payable for periodical renewals.

[They cited *Eaton* v. *Lyon* (1); *Baynham* v. *Guy's Hospital* (2); *Rubery* v. *Jervoise* (3); and *Bythewood's* Conveyancing (4).]

Mr. *Druce,* Q.C., and Mr. *William Druce,* for the bill:—

On the question of jurisdiction: this point is concluded by the agreement of the parties. The company agreed to make compen-

(1) 3 Ves. 690.
(2) Ibid. 295.
(3) 1 T. R. 229.
(4) Vol. iv. p. 396.

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sation when the right should have been substantiated. They have now put themselves in the position of the parties as against whom the right must be substantiated, if at all, and cannot nullify their agreement. Apart from this, *Brandon* v. *Brandon* (1) and *Ex parte Cooper* (2) are authorities that, for such a case, there are no provisions in the *Lands Clauses Consolidation Act*, and that this Court has jurisdiction.

On the question of construction: the cases cited on behalf of the Defendants are not analogous. In all there was either an express covenant, or an equivalent undertaking by the lessees to renew. This proviso is free from ambiguity, and quite consistent; and there is no reason to be derived from the context, or the manifest intention of the parties, for not giving to the words used their natural purport.

Mr. *Giffard*, in reply.

March 6. SIR W. PAGE WOOD, V.C.:—

Upon the question of jurisdiction, I am of opinion that the bill is not demurrable. It is said that the Court will not entertain a bill seeking merely a declaration of future rights. But the company cannot be allowed to take a man's property from him until the value of his interest has been ascertained; and if no special machinery under the *Lands Clauses Act* exists for that purpose, the Court will deal with and decide that question: *Brandon* v. *Brandon*(1) *Ex parte Cooper*(2) The company have, under the agreement which they entered into, agreed that in the event of the Plaintiff substantiating her right to a renewal, they will pay an additional sum, the amount to be settled by arbitration under the *Lands Clauses Act*. How is the Plaintiff to substantiate her claim without coming here? There is no other course open to her. She cannot come at the end of the fourteen years, when the company is in possession of the property, and the line has been constructed, and then ask for a renewal. The land has been taken out and out, and she wants to be paid out and out. Under these circumstances

(1) 2 Dr. & Sm. 305. (2) 2 Dr. & Sm. 312.

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I think I am in a position to determine what the right of the Plaintiff is, notwithstanding the period for the exercise of it has not yet arrived.

Upon the construction of the instrument the words are so plain that I really can have no doubt there is an option of renewing the lease at the end of any fourteen years in the whole term of sixty-one years. I am of opinion that the lessee, or those who represent him, have not lost the right of renewal under the covenant, but may at any time give notice of a desire to renew, so as to get the benefit of a renewal in case they should wish to sell their interest under the lease. If they hold to the lease they may not want to renew at the expiration of every period of fourteen years. If, on the other hand, they want to sell, it is consistent with reason that they should desire, and one can quite understand that they should have contracted for, liberty to get this renewal at any period. The authorities cited do not, in my opinion, touch the case. The demurrer must, therefore, be overruled, with costs.

Solicitors: Mr. *J. R. Aikman;* Messrs. *Beale, Marigold, & Beale.*

MACNEE *v.* GORST.

V.-C. W.
1867
June 14, 25, 26.

Factors' Acts (6 *Geo.* 4, *c.* 94, *and* 5 *&* 6 *Vict. c.* 39)—*Pledge by Factor—Antecedent Debts—Advances.*

The *Factors' Act* (5 & 6 Vict. c. 39) does not apply to pledges for antecedent liabilities (whether they may or may not have ripened into debts), where no actual advance is made at the time of the pledge. Therefore where *H.*, a factor, pledged goods of his principal to *G.*; first, to secure the payment of an acceptance of *H.* in *G.'s* hands, not then due, which had been given to protect *G.'s* liability on a contract as *H.'s* broker; secondly, to repay to *G.* his loss on a resale of goods which *G.* had purchased for *H.* in his own name:—

Held, that the transaction was not protected by the *Factors' Act* (5 & 6 Vict. c. 39), and, *semble*, that both liabilities were antecedent debts.

Jewan v. *Whitworth* (1) explained.

THE Plaintiffs, *James Macnee* and *James Tweedie*, trading at *Bombay*, under the firm of *Macnee & Co.*, in August, 1864, con-

(1) Law Rep. 2 Eq. 692.

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signed to the Defendant, *Edward Hornby Hodgson*, merchant and factor, of *Liverpool*, carrying on business under the firm of *Hodgson, Mather, & Co.*, 342 bales of cotton by the ship *British Empire*, for sale, and on the 8th of August forwarded the bills of lading, which were received in due course. In anticipation of the shipment, *Macnee & Co.* had drawn upon *Hodgson, Mather, & Co.* nine bills of exchange for £1000 each, dated the 9th of May, 1864, payable at six months after sight, which bills having been sold in the market to other Plaintiffs, the *Chartered Mercantile Bank of India*, were presented by them to *Hodgson & Co.* on the 7th of June, 1864, who accepted them on that day. It was admitted that these bills were drawn against the above consignment in the ordinary way, without any special agreement.

On the 17th of October, 1864, *Hodgson* pledged the 342 bales, and indorsed and delivered over the bills of lading for the same to the Defendant *William Arthur Gorst*, upon which occasion the following letters were signed and exchanged :—

"*Liverpool*, 17th Oct., 1864.

"*W. A. Gorst*, Esq.,

"Dear Sir,—In consideration of your advancing us the sum of £500, and agreeing to retire our acceptance to your draft for £2709 3*s.*, due 23rd inst., as well as your paying the loss upon our *China* contract through you, dated 2nd July, estimated at about £1250, now overdue, in cash, we now place in your hands bill of lading and insurance policy for 342 bales *Omerawattee* cotton, per *British Empire*, the cotton to be sold by you on arrival, and the remaining funds, if any, arising from the sale of the cotton to be paid to Messrs. *Hodgson & Cookson.*

"We remain, yours faithfully,

(Signed) "*Hodgson, Mather, & Co.*"

"*Liverpool*, 17th Oct., 1864.

"Messrs. *Hodgson, Mather, & Co.*,

"Gentlemen,—I have much pleasure in owning receipt of bill of lading and policies of insurance of 342 bales of *Surat* cotton, shipped per the *British Empire* from *Bombay*, which you placed in my hands this afternoon, to be realized on your account on arrival, against which I have advanced you £500 on my cheque

upon the *Commercial Banking Company*, agreeing at the same time to retire your acceptance of my draft under 20th September for £2709 3*s.*, due 23rd October, and also to pay against the same documents the loss upon your *China* contract through me, dated July 2nd, estimated at about £1250, now overdue, in cash; and I further agree to pay over the remaining funds, if any, arising from the sale of that property, to Messrs. *Hodgson & Cookson* of this place.

"Yours respectfully,

(Signed) "*W. Arthur Gorst.*"

On the 21st of October, 1864, *Hodgson, Mather, & Co.* stopped payment, and on the 10th of December, 1864, the bills of exchange presented by the *Chartered Mercantile Bank* to *Hodgson & Co.* for payment were dishonoured.

On the 28th of December, *Macnee & Co.* served *Gorst* with notice that the 342 bales of cotton ex *British Empire* were their property, and demanding delivery; to which *Gorst* replied by saying that he had sold the cotton, and denied all right and title of the Plaintiffs to the same, or any part thereof.

The bill was filed on the 25th of May, 1865, charging that the above pledge was made for the purpose of securing antecedent debts then due from *Hodgson & Co.* to *Gorst*, namely, the two debts of £2709 3*s.* and £1268 11*s.* 10*d.*, and also the general balance of account then due from *Hodgson & Co.* to *Gorst*, and prayed for a declaration that the pledge, and the deposit, indorsement, and delivery of the bills of lading conferred on the Defendant *Gorst* and the Defendants *Reginald Hodgson* and *Cookson* no right or title in equity to the cotton, or the proceeds thereof, except to the extent of the advance, if any, *bonâ fide* made by the Defendants to *Hodgson & Co.* contemporaneously with the pledge and deposit.

The Defendant *Gorst*, by his answer to the bill, gave the following account of the transaction. He said that, on the 17th of October *Hodgson* brought him the bills of lading for the 342 bales per *British Empire*, and requested him to make him (*Hodgson*) an advance upon them. "There were at this time open accounts between me and the said *Edward Hornby Hodgson* in respect of previous cotton transactions, in which I had acted as broker for the said *Edward*

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Hornby Hodgson. In particular, there was a sum of £2709 3*s.*, partly for cotton which had been purchased by me for them, and partly for losses and commissions on some of such previous transactions, for which he had accepted a bill of exchange, dated the 20th of September, 1864, drawn by me upon him for his accommodation, and payable on the 23rd of October, 1864, and which he was bound to take up.

"At the same time, there was also a further sum of £1268 12*s.* 11*d.*, for another loss in respect of another of such previous transactions, called the *China* contract, and such other loss was then estimated at about £1250, but was afterwards ascertained to be £1268 12*s.* 11*d.* I was liable for such last-mentioned amount to *Percival Brothers & Co.*, from whom the cotton, in respect of which such last-mentioned loss had been made, had been purchased by me as broker for the said *Edward Hornby Hodgson*, but without disclosing his name to them; but the said *Edward Hornby Hodgson*, as between him and me, was the person solely liable to make good such amount."

As money was then extremely dear, the bank rate of discount being 9 per cent., the Defendant at first refused to make any advance, but later in the same day he consented to do so, and at length came to the agreement which is expressed in the two above stated letters.

Defendant went on to say that he did, out of his own moneys, retire the bill for £2709 3*s.*, and also in like manner provided £1268 12*s.* 11*d.* for the loss on the *China* contract. He had no notice that the cotton was not *Hodgson's* own property, or that any one else was interested in it. In December, he sold the cotton for the gross sum of £8741 13*s.*, and the net proceeds, which were due on the 28th of March, 1865, amounted to £8466 11*s.* 5*d.*, out of which he retained the principal and interest due to him, including the general balance of account due to him from *Hodgson*, and paid over the balance to *Hodgson, Cookson, & Co.*

He said the pledge was made to secure the contemporaneous advance of £500, and also the repayment of the two sums of £2709 3*s.* and £1268 12*s.* 11*d.*, which he undertook to pay on account and on behalf of *Hodgson*, and which he subsequently

paid as above stated, and not to secure any antecedent debt. He claimed to retain the general balance of account by virtue of a custom of the *Liverpool* cotton market.

The following passages from the Defendant *Gorst's* affidavit were also referred to by His Honour:—

"On the 20th of September, 1864, I received from the Defendant, *Hodgson*, the acceptance of his firm of *Hodgson, Mather, & Co.*, to my draft for £2709 3*s*. Such acceptance was given in respect of the sum of £2209 4*s*., which was then due to Messrs. *Schemeil Brothers*, through me, from the said *E. H. Hodgson* for cotton bought from them by me on his account, and the balance for estimated losses due to me on some previous transactions in cotton, in which I had acted as his broker. . . .

"On the 2nd of July, 1864, I was instructed by the Defendant *Hodgson*, to purchase for him, as his broker, 500 piculs of *China* cotton. . . . I accordingly, on the 2nd of July, 1864, purchased 500 piculs *China* cotton, from Messrs. *Percival Brothers*, cotton brokers of *Liverpool*. The contract of purchase was entered into by me in my own name, without disclosing my principal, and I was, therefore, liable to Messrs. *Percival Brothers*, on such contract. . . .

"On the 22nd of September, 1864, by instructions of the said *E. H. Hodgson*, I re-sold the said last-mentioned cotton to Messrs. *B. Whitworth Brothers*, at 14½*d*. per pound, which was the best price which could be obtained for the same at that time. The net price due to Messrs. *Percival Brothers*, on the purchase by me of the said cotton, was £5139 16*s*., and it became payable on the 3rd of October, 1864, less three months' interest as by custom."

It appeared that at the date of the filing of the bill, the bill of exchange for £2709 3*s*. was still in *Gorst's* possession. It also appeared from *Gorst's* books that he had debited *Hodgson* with the £5139 16*s*., as due on the 3rd of October, 1864.

Mr. *Willcock*, Q.C., and Mr. *Bowring*, for the Plaintiffs:—

As to the £500, we raise no question.

With respect to the bill for £2709 3*s*., although the acceptance was not due till the 23rd of October, which was subsequent to the

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pledge on the 17th, we say the bill was accepted by *Hodgson* on the 20th of September, to discharge his own liability to *Gorst*, as his broker, in respect of a contract for the purchase of cotton from *Schemeil & Co.*, and that it amounts to an acknowledgment of a debt then due from *Hodgson* to *Gorst*. There was a right of action existing, though the action might be deferred till the bill was dishonoured. *Gorst* does not say when he paid *Schemeil & Co.*, or that he has actually paid them; but it is the fact that *Hodgson's* acceptance remained to the last in *Gorst's* possession, proving that, if the pledge be set aside, the debt from *Hodgson* to *Gorst* is still in existence. *Gorst* may yet sue *Hodgson* on the bill, and so the case is brought almost within the words of *Learoyd* v. *Robinson* (1).

On the *China* contract, *Gorst* alone was liable to *Percival Brothers* for the £5139 16*s.*, but he had debited *Hodgson* with this sum in account as on the 3rd of October; and the balance after the re-sale represented, not the debt from *Gorst* to *Percival Brothers*, but the debt from *Hodgson* to *Gorst*.

As to the custom, the allegation is monstrous in itself; *Leuckart* v. *Cooper* (2): but were the custom ever so good, it was ousted by the special agreement.

Except, therefore, as to the £500, these were antecedent debts; the Factors' Acts are excluded, and the ordinary rules of law apply.

Mr. *Kay*, Q.C., and Mr. *W. F. Robinson*, for the Defendant *Gorst*:—

First, as to the *China* contract, until *Gorst* paid *Percival Brothers*, there was no debt due from *Hodgson* to *Gorst*, and the case is precisely within *Jewan* v. *Whitworth* (3). *Gorst* could not have sued *Hodgson* until he had himself parted with money. No entry in *Gorst's* books can alter the truth and fact of the case.

As respects the bill of exchange, there was clearly no debt till the bill fell due. *Gorst* was not liable till *Hodgson* had made default. In *Learoyd* v. *Robinson*, the important distinction is, that the bill was actually overdue. Moreover, in *Learoyd* v. *Robinson*, there

(1) 12 M. & W. 745. (2) 3 Scott, 521.
(3) Law Rep. 2 Eq. 692, 702.

were two co-debtors, whereas *Gorst* was surety only, *Hodgson* being the principal debtor.

[Reference was made to *Navulshaw* v. *Brownrigg* (1).]

SIR W. PAGE WOOD, V.C.:—

I think, when the whole facts, which are not in controversy, are known, there is no difficulty in seeing that the cotton cannot be available for anything beyond the actual money advanced, namely, the £500.

I think it would be imputing a very narrow view to the framers of the statutes if I were to hold that, because where a man has become surety for another, there is no debt from the principal to the surety until the principal has made default and the surety has been called upon to pay, therefore, if the surety relieves himself of the liability by paying the debt, such a payment is not in respect of an antecedent debt, and that a pledge of goods, given by the principal to the surety to obtain such a payment, will be protected by the Factors' Acts.

Of course such a pledge could not be protected except by the Factors' Acts. Then what do the Factors' Acts enable the factor to do? [His Honour read the 1st and 3rd sections of the 5 & 6 Vict. c. 39, remarking that there were two things for which a valid pledge could be made, namely, an advance originally made, and a continuing advance on the same goods, but both must be *advances of money* against the goods: also that the former part of the 3rd section did not appear to apply to this case; and continued:—]

The words "and to no further or other intent and purpose," in the 3rd section, shew that the case of an antecedent debt is not the only case which is excepted from the statute, but one of the many cases in which it is declared the statute shall not have effect. The statute is careful to say what the Legislature really did intend, namely, that the agent shall be empowered to obtain money which he may want for his principal's purposes; that the lender is not required to ask any question about that; and that an agent in the possession of goods, who is entrusted with selling

(1) 2 D. M. & G. 441.

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them, shall also have the opportunity of borrowing upon them. He may either sell or borrow; but he must raise money—it must be an advance of money. The section says, the statute shall not protect an antecedent debt, it shall protect only an advance, and nothing else whatsoever.

Then there remains the question whether, with respect to the rest of the transaction beyond the £500, there was any advance.

Now Mr. *Gorst* gives the following account of the transaction in his answer and affidavit:—[His Honour read the paragraph from Mr. *Gorst's* answer set out above, observing that he considered the statement to amount to this,—that *Hodgson* owed *Gorst* £2709, for which he had accepted a bill of exchange. For what was that bill accepted? For the previous transaction, open accounts, or whatever they might be called. His Honour continued:—]

If a man has an account with you, and there is a balance due to you, and for that balance he accepts a bill of exchange, I apprehend that is a distinct debt due from him to you. He has paid you by a bill of exchange, but, of course, if the bill is not paid by him at maturity, the bill being dishonoured, and you not getting your money, it remains a debt. Therefore, when security is given for the purpose of enabling the person who has been paid by a bill of exchange to get payment in money, it is in truth saying, in so many words, "I give you these goods to pay the debt for which I gave you the bill, and which I don't find it convenient to pay in money."

The way in which it is stated in the affidavit is a little more full. [His Honour read the extract set out above, and observed that what it came to was, that a debt was due from *Hodgson*, though the transaction was so muffled up in words as not to be called a debt. The deponent did not say whether or not he had paid *Schemeil* as to this transaction, though he was a little more particular in saying he had paid the persons to whom he made himself primarily liable. His Honour continued:—]

The bill was not due till the 23d of October, and this transaction took place on the 17th; but I apprehend that makes no difference. If a bill is given to secure an antecedent debt, though the bill is not actually due at the time when the pledge is made, yet if the pledge is made for the purpose of taking up that bill, it

is made for the purpose of paying that antecedent debt which the bill was intended to cover.

I think the other transaction is, if possible, plainer still, because it stands thus: *Gorst* buys for *Hodgson*, on the 29th of September, upwards of £5000 worth of goods, and he debits *Hodgson* with that sum in account. At the same time he says he is not *Hodgson's* creditor, because he has made himself liable to pay this sum on the 3rd of October to the person from whom he bought. On the 17th of October, being liable to *Percival & Co.* for this £5139, and having charged *Hodgson* with it in account, he sells the cotton again for £3896, also payable on the same 3rd of October. The balance upon that is £1268 12*s.* 11*d.*, and, as Mr. *Bowring* remarked, this balance represents, to all intents and purposes, the debt due from *Hodgson* to *Gorst*, and not in any way a sum which is owing from *Gorst* to *Percival*.

Then, in order, I suppose, to bring the transaction within the scope of some remarks in *Jewan* v. *Whitworth* (1), the Defendant says, "It was not a debt due to me because I had not paid *Percival & Co.* Until I paid *Percival & Co.* it was no debt due to me." But I doubt very much whether it is competent to *Gorst* to say this, when he has treated the £5139 as due to him in account from *Hodgson*, and in the face of the letter from *Hodgson* to *Gorst* of the 17th of October, 1864. I think that, as the whole matter was, on the 17th of October, treated as accomplished, this must be considered an antecedent debt within the very words and purview of the statute. The observations in *Jewan* v. *Whitworth* must be taken with reference to the whole transaction, and the position in which that case stood, which was very different from the present. In that case there was an arrangement by which *Whitworth*, the person buying in his own name, had become liable for *Hodgson*, the person for whom he bought, which liability would result in a debt due, as soon as *Whitworth* made the payment, from *Hodgson*, who pledged the goods, to *Whitworth*, the broker, who had so pledged his credit. But the money not having been yet actually paid, the broker, not having funds to make the payment, went to a third person, *Clare*. *Whitworth*, who held the same position there that *Gorst* does here, did not say to *Hodgson*, "Give me the cotton

(1) Law Rep. 2 Eq. 702.

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that I may raise the money and free myself from the liability," but wanting to raise money for the purpose of paying this liability, he went to *Clare* with the documents of title, *Clare* having no antecedent claim against *Hodgson*, and being under no obligation to provide for the payment, and, with the consent of the principal, asked *Clare* to advance this money, *Clare* agreed to do this, upon having the securities, and they were put into *Whitworth's* hands for the purpose of being handed to *Clare*, and for the purpose of raising this money. It was with reference to that part of the case that I made the observations upon which Mr. *Kay* relied, at p. 702 of the report of *Jewan* v. *Whitworth*.

I now come to *Learoyd* v. *Robinson* (1). There *Clark*, being jointly liable with the Defendant on a bill of exchange which had become due, obtained from the Defendant £300 for the purpose of taking up the bill, and at the same time deposited with him the Plaintiff's goods. Mr. Justice *Coltman* told the jury, that if they thought the transaction was only a circuitous mode of paying the bill on which the Defendant was liable, it was not within the *Factors' Act*, and the Plaintiff was entitled to recover. The learned Judge seems to have read the Act as I do, as protecting every *bonâ fide* advance; but only *bonâ fide* advances, and not antecedent debts.

So in *Jewan* v. *Whitworth*, *Whitworth* was under a liability which, when he made payment, would become a debt from *Hodgson* to himself; but the advance by the *Clares* was entirely within the meaning and purview of the statute, though in one sense there was an antecedent debt of *Whitworth* to the vendors of the cotton.

From the remark of Baron *Parke* in *Learoyd* v. *Robinson*, "The transaction was not that of a loan at all; and the owner of the goods never had the least chance of getting the money," it is clear that what was passing in the mind of the Court was this:—The *Factors' Act* gives the factor all the powers that an owner would have of raising money. It is for the benefit of mankind that he should have such powers—there is the chance of the money so raised going to the employer—if the factor be an honest man it will reach the employer; but the goods are not to be pledged to pay an antecedent debt, instead of an immediate advance.

(1) 12 M. & W. 745.

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I think the result of Mr. *Gorst's* statement is this:—"*Hodgson* owed me so much money, and in order to get the bill paid I took the pledge."

Here the debt due from *Hodgson* to *Gorst* was £5100 and upwards. Against that the sum of £3800 and upwards was set off, whether before or after the transaction in question I do not stop to inquire. Then, in his letter of the 17th of October, *Gorst* acknowledges the receipt of the bills of lading, and agrees "to pay, against the same documents, the loss upon your *China* contract through me, dated July 2nd, estimated at about £1250, now overdue in cash." This is no advance in money, it is only a settlement of liabilities in account. Before, *Gorst* was liable to pay the money in the case of *Hodgson* being unable to pay it; now he himself agrees to discharge the liability.

Now I think *Gorst* has dealt with this sum of money in such a way as precludes him from saying it was not to be treated as a debt between him and *Hodgson*. But, if I should be wrong in that view, and if this should not be an antecedent debt, but only a liability, then I think it is a transaction which is not protected by the statute, because I read the 3rd section of the 5 & 6 Vict. c. 39, as protecting nothing except an actual advance of money; and I look at this transaction as one in which *Gorst* relieved himself from a liability under which he was placed, borrowing no money from anybody, and placing no money in the hands of those who pledged the goods.

As to the general balance, it is concluded by authority that whatever be the custom, brokers and others have no hold for their general balance, when there is a specific agreement with reference to the object of the deposit. There are numerous cases with regard to short bills deposited with bankers, and the like. *Cowell* v. *Simpson* (1), was a case of an attorney's deposit; but there are numerous authorities to shew that where there is a special agreement the general lien is ousted, and you can only rely on your special agreement.

There will be a declaration that the pledge of the 342 bales of cotton, and the deposit, indorsement, and delivery of the bills of lading for the same, by *Hodgson & Co.* to the Defendant *Gorst*,

(1) 16 Ves. 275.

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conferred on the Defendant *Gorst* no right or title, except as to the £500 advanced, and except to the extent of the lien of the Defendants for freight and other charges and expenses properly incurred, and paid by them respectively, and except as to the amount which has been paid over to *R. Hodgson & Cookson.* The Defendant *Gorst* to pay the costs of the suit except so far as they have been increased by *R. Hodgson & Cookson* being parties (their costs being borne by themselves by agreement).

Mr. *Kay* said that, if it should appear, on taking the account between the Plaintiffs and *Hodgson,* that the Plaintiffs were indebted to *Hodgson,* to that extent, the fund would belong to *Gorst,* under the first *Factors' Act,* he having dealt with *Hodgson* in ignorance of his being other than the true owner. Under these circumstances, as the bill prayed for an account of all dealings between *Hodgson, Mather, & Co.* and the Plaintiffs up to the date of the pledge, he asked for that account.

Mr. *Willcock* said that, if the Defendant *Gorst* asked for such an account, he must take it at the peril of costs.

The VICE-CHANCELLOR said that if the account were asked, he must grant it. At the same time the Plaintiffs were entitled to have the money paid to them, and if the Defendant chose to file a bill to have the benefit of the lien, that would be another thing. An account would accordingly be directed at the request of the Defendant, which he might prosecute or not as he thought fit.

Solicitors for the Plaintiffs: Messrs. *Clarke, Son, & Rawlins.*

Solicitors for the Defendants: Messrs. *Gregory, Rowcliffes, & Rawle,* agents for Messrs. *Duncans, Squarey, & Co., Liverpool.*

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June 10, 11.

Pleading—Plea—Discovery—Forfeiture—Penalty under Foreign Law.

To a bill by the *United States of America*, praying an account of all moneys received by the Defendant as agent of the so-called *Government of the Confederate States of America* in this country, and consequential relief, the Defendant pleaded that, by an Act of Congress, the property of all persons acting as agents of the *Confederate Government* was made liable to confiscation, and that proceedings *in rem* were actually pending in the *United States* to obtain a seizure of his property on the ground of such agency; that no pardon had been extended to Defendant; and that it was inequitable for the *United States* to sue for relief in this Court without first waiving the forfeiture, and abandoning the proceedings *in rem*.

Plea allowed on the ground that he who seeks equity must do equity, and that the Plaintiffs were not entitled to the assistance of equity in this country to obtain the moneys held by the Defendant as agent, without waiving the forfeiture to which his agency exposed him in the *United States*.

The case distinguished from *The King of the Two Sicilies* v. *Willcox* (1), by the admission by the Plaintiffs, upon the present record, of the facts averred in the plea in bar of the discovery and relief sought by the bill.

Partly affd & partly revd by L. C. 3 Ch. 79.

PLEA.

The bill contained the following averments:—

1. In the year 1861 divers persons who were inhabitants and subjects of, and owed allegiance to, the Plaintiffs, the *United States of America*, rose in rebellion against the government of the Plaintiffs, and formed themselves into an association for the purpose of carrying on the said rebellion. The said several persons usurped the Plaintiffs' authority, and established in part of the Plaintiffs' dominions a pretended government under the style of the "*Government of the Confederate States of America*," which assumed the administration of public affairs there, and exercised such usurped authority during the rebellion, and until the rebellion was put an end to as after mentioned.

2. The said pretended government during the period of their exercising such usurped authority as aforesaid, possessed themselves of divers moneys, goods, and treasures, which were part of the public property of the Plaintiffs, and other moneys and goods were

(1) 1 Sim. (N.S.) 301.

SC at hearing 8 Eq. 69.

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from time to time paid and contributed to them by divers persons being inhabitants of the *United States*, and who owed allegiance to the Plaintiffs, or were seized and acquired by the said pretended government in the exercise of their usurped authority; and all the said moneys and goods became part of the public property of the said pretended government, or were employed, or intended to be employed, by them for the purposes of the said pretended government, and in aid of the said rebellion.

3. The said pretended government, and their agents, sent to divers agents, and other persons in *England*, large amounts of money to be laid out in purchasing goods, or otherwise for the use of the said pretended government, and also sent to *England* large quantities of goods to be sold, and the proceeds to be laid out in purchasing goods, or otherwise, for the use of the said pretended government.

4. The said pretended government and their agents, at the time aforesaid, sent large sums of money, and large quantities of goods, to *Colin J. McRae*, the above-named Defendant, and the said *Colin J. McRae* sold a large part of the said goods, and received the moneys from such sale, and at the dissolution of the said pretended government the said Defendant had in his possession or power large sums of money, and large quantities of goods, which had been so sent to him as aforesaid, or which had arisen from moneys and goods so sent to him as aforesaid.

5. The said rebellion was entirely suppressed, and is now at end, and the said association, or so-called *Confederate Government*, has ceased to exist, and the several persons who had formed themselves into the said pretended government, and on whose account the said moneys and goods were sent as aforesaid, have submitted to the authority of the government of the *United States*, and all the joint or public property of the persons who constituted the said pretended or so-called *Confederate Government*, including the said moneys and goods, have vested in the Plaintiffs, and the so-called *Confederate Government* does not, nor does any person on their behalf, now claim to be entitled to, or interested in, the said moneys and goods, and by reason of the said government being dissolved they cannot be made parties, and they are not, in fact, necessary parties to this suit.

6. The said moneys and goods are now the absolute property of the Plaintiffs, and ought to be paid and delivered to them, or to their order.

The prayer of the bill was for an account of all moneys and goods which had come to the hands of the Defendant as agent for, or otherwise on behalf of, the said pretended government, and of his dealings therewith, and that Defendant might be ordered to pay to Plaintiffs the moneys which, on taking such account, might be in his hands, and to deliver over to Plaintiffs the goods which were so in his hands. The bill also prayed the appointment of a receiver, and an injunction against any parting with the goods in his hands.

To this bill the Defendant had put in a plea setting forth an Act of Congress of the above-named Plaintiffs, the *United States of America*, approved the 17th of July, 1862, by which it was enacted as follows:—"Sect. 5. To insure the speedy termination of the present rebellion it shall be the duty of the President of the *United States* to cause the seizure of all the estate and property, moneys, stock, credits and effects, of the persons hereinafter named in this section, and to apply and use the same, and the proceeds thereof, for the support of the army of the *United States*, that is to say, of any person hereafter acting as an officer of the army or navy of the rebels in arms against the government of the *United States*;" of any person acting as President, Vice-President, &c., or holding any office in the so-called *Confederate States*; "of any person hereafter holding any office or agency under the government of the so-called *Confederate States of America*, or under any of the several states of the said Confederacy, or the laws thereof, whether such office or agency be national, state, or municipal, in its name or character, provided that the persons above described shall have accepted their appointment or election since the date of the pretended ordinance of secession of the state, or shall have taken an oath of allegiance to, or to support, the constitution of the so-called *Confederate States*; of any person who, owning property in any loyal state or territory of the *United States*, or in the district of *Columbia*, shall hereafter assist, and give aid and comfort to such rebellion."

Sect. 6 provided that the estate and effects of all persons

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engaged in armed rebellion against the government of the *United States*, or aiding or abetting such rebellion, and not returning to their allegiance within sixty days after public warning and proclamation, should be liable to seizure, "and it shall be the duty of the President to seize and use (such property) as aforesaid, or the proceeds thereof."

Sect. 7. "To secure the condemnation and sale of any of such property after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the *United States* in any District Court thereof, or in any Territorial Court, or in the *United States* District Court for the district of *Columbia*, within which the property above described, or any part thereof, may be found, or into which the same, if moveable, may first be brought; which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases, and if the said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property, and become the property of the *United States* and may be disposed of as the Court shall decree, and the proceeds thereof paid into the treasury of the *United States* for the purposes aforesaid."

Sect. 8 referred to the carriage of such proceedings, and the vesting of the property seized in the purchasers.

Sect. 13. "The President is hereby authorized at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any state, or part thereof, pardon and amnesty, with such exceptions, and at such time, and on such conditions, as he may deem expedient for the public welfare."

Sect. 14 enabled the Courts of the *United States* to do all things necessary for carrying the Act into effect.

The plea further alleged:—"That this Defendant is seised of, and entitled to, and is the proprietor of certain lands, hereditaments, real estate, and immoveable property situate in *Selma*, in the county of *Dallas*, in the state of *Alabama*, in the *United States of America*, and that under and by virtue of the said Act of Congress proceedings *in rem* have been instituted, and are now being prose-

cuted, and are now pending in the name of the above-named Plaintiffs, the *United States of America*, and on their behalf, and with their authority, in the District Court of the said *United States of America*, at *Montgomery*, in the said state of *Alabama*, within the district of which Court the said land belonging to this Defendant is situate and found, to secure the condemnation and sale of such land, and the confiscation thereof, and of the proceeds thereof, for the use of the above-named Plaintiffs, the *United States of America*, on the ground of the same belonging to this Defendant, and on the alleged ground of this Defendant being one of the persons named and specified in the said Act of Congress as aforesaid, whose estate and property were and are liable to be seized, and condemned, and confiscated, for the use of the above-named Plaintiffs, the *United States of America*, under and by virtue of the said Act of Congress."

"And this Defendant further saith, that the alleged rebellion mentioned in the said Act of Congress is the alleged rebellion mentioned in the bill of complaint in this suit, and that the so-called *Confederate States of America* mentioned in the said Act of Congress were and are the same as the pretended government, under the style of the *Government of the Confederate States of America*, mentioned in the bill of complaint in this suit."

"And this Defendant further saith, that the alleged acts of this Defendant in the said bill of complaint alleged, and his alleged conduct, as agent for and on behalf of the said government of the *Confederate States of America*, as in the said bill of complaint alleged, are also alleged and insisted upon by and on behalf of the above-named Plaintiffs, the *United States of America*, in the said proceedings *in rem* in the said District Court, as evidence and in proof that this Defendant was and is, and as constituting him one of the persons named and specified in the said Act of Congress, whose estate and property were and are liable, and ought to be seized, and condemned, and confiscated thereunder, and as evidence and in proof that the said lands, &c., belonging to this Defendant as aforesaid, were and are liable and ought to be seized, and condemned, and confiscated for the use of the said *United States of America*, according to the provisions of the said Act of Congress."

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"And this Defendant further saith, that no pardon or amnesty has been extended under the said Act of Congress to this Defendant."

"And this Defendant further saith, that this Defendant cannot answer the interrogatories filed for the examination of this Defendant in answer to the bill of complaint, or make any answer to the said bill of complaint, without exposing this Defendant to the condemnation, and sale, and confiscation, by and for the use of the Plaintiffs, the *United States of America*, by means of the said proceedings *in rem* under the said Acts, of the land belonging as aforesaid to this Defendant, and that it is inequitable that the Plaintiffs should sue for or obtain any relief in this suit without extending a pardon and amnesty to this Defendant under the said Act, and waiving and releasing to this Defendant the forfeitures and penalties of the said Act, and abandoning the said proceedings *in rem*."

"All which matters and things this Defendant doth aver to be, and he pleads the same in bar to the whole of the discovery and relief sought by the said bill, and prays the judgment of this Honourable Court in respect thereof."

The plea was set down for argument.

Mr. *W. M. James*, Q.C., Mr. *Marten*, and Mr. *J. P. Benjamin*, in support of the plea:—

No one is bound to answer so as to subject himself to penalties, or to anything in the nature of a forfeiture, and as the forfeiture to which the Defendant, who is owner of real estate in the state of *Alabama*, would be liable, under the Act of Congress, as an agent of the late *Confederate Government*, is not matter apparent upon the bill, the defence is properly taken by plea: *Duncalf* v. *Blake* (1); *Smith* v. *Read* (2); *Harrison* v. *Southcote* (3).

The bill is substantially a bill for discovery, as, but for the discovery which is sought, there is nothing to shew that there would not be a sufficient remedy at law, and therefore the plea is good, not only as to the discovery, but also as to the relief. But in any case, the plea may be good as to part, and might be allowed as to

(1) 1 Atk. 52. (2) 1 Atk. 526. (3) 1 Atk. 528.

the discovery, though overruled as to the relief: *Harrison* v. *Southcote* (1); except in the case of a plea to the jurisdiction, which is regarded no more favourably than a demurrer which covers too much, and is therefore bad as to all: *Bishop of Sodor and Man* v. *Earl of Derby* (2). With respect to the form of relief prayed by the bill, the Plaintiffs have no right, independently of the discovery, to an account, there being nothing in the bare relation of principal and agent which can give any right to an account in equity: *Barry* v. *Stevens* (3); *O'Mahony* v. *Dickson* (4).

On the general principle, that he who seeks equity must do equity, the Plaintiffs are not entitled to obtain relief in this Court without first waiving the penalties and forfeiture which they are at this moment seeking to enforce against the Defendant in the *United States* Courts, and submitting the whole matter to the jurisdiction of this Court: *Shish* v. *Foster* (5); *Lord Uxbridge* v. *Staveland* (6); *Hanson* v. *Keating* (7); *Phelps* v. *Prothero* (8). The Plaintiffs cannot "approbate and reprobate;" they cannot treat the Defendant as guilty of tort, and liable to penalties in one jurisdiction, while they are seeking an account against him in this country in respect of the very same transactions. What they are doing is, to confiscate his property in the *United States*, because he has acted as agent of the *Confederate States* at the same time that they are seeking to obtain, through the medium of an English Court of equity, the moneys which he has acquired as such agent. They cannot be allowed to pursue both these remedies simultaneously. [*Monnins* v. *Monnins* (9); *Welby* v. *Duke of Rutland* (10); *Mitford* on Pleading (11), were also cited.]

Mr. *G. M. Giffard*, Q.C., and Mr. *Wickens*, for the bill:—

The plea is not a plea to the discovery, but a plea to the relief, being to the bill generally, and not to the interrogatories, many of which might be answered without touching the question as to the Defendant's agency. As a plea to the relief it cannot be sup-

(1) 1 Atk. 528.
(2) 2 Ves. Sen. 337, 356.
(3) 31 Beav. 258.
(4) 2 Sch. & Lef. 400.
(5) 1 Ves. Sen. 88.
(6) 1 Ves. Sen. 56.
(7) 4 Hare, 1.
(8) 7 D. M. & G. 722.
(9) 2 Rep. in Chan. 36.
(10) 2 Bro. P. C. 39.
(11) Pages 231-3, 333.

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ported, and being a plea to the relief it is not open to the Court to allow it as to the discovery only.

The VICE-CHANCELLOR:—As regards waste, tithes, and usury, it is settled that the Plaintiff can have no discovery without waiving the penalty; and the reason for inserting the waiver in the bill is to give the Defendant the opportunity of coming to the Court for an injunction in case the Plaintiff should proceed, upon the discovery which he has elicited by his bill, to enforce the penalty. In *Mason* v. *Lake* (1) the bill was ordered to be amended by waiving all penalties and forfeitures upon argument of a demurrer on that ground; and again in *Attorney-General* v. *Vincent* (2) a demurrer was allowed to a bill to discover waste, "because there is a forfeiture of the place wasted and treble damages, and yet the Attorney-General has not waived forfeiture." My impression always was that a bill would be demurrable if the penalties were not waived.

Mr. *Wickens*:—When the bill is filed in respect of the identical thing, which is increased by the penalties, as in a suit for tithes or waste, then there must be a waiver; but if, as here, the penalty sought to be enforced against the Defendant is altogether *res alia* from the relief prayed by the bill, then the non-waiver of the penalty, though it might affect the right to discovery, cannot disentitle the Plaintiff to the relief as distinguished from the discovery, and consequently a plea to the relief is not maintainable in such a case. In *Mason* v. *Lake* the demurrer must have been limited to the discovery. The case is not one of "approbation and reprobation." The Plaintiffs claim the right of punishing rebels in their own dominions, and also of recovering their property when found in this country; and this right of foreign sovereign states has been recognised and enforced by Courts of equity: *Emperor of Austria* v. *Day* (3).

[The VICE-CHANCELLOR:—In that case the Emperor of *Austria* was pursuing his remedy in equity only, and was not seeking to enforce any penalties against the Defendants.]

(1) 2 Bro. P. C. 495. (2) Bunb. 192.
(3) 3 D. F. & J. 217.

But in any case the rule that a Defendant is not bound to answer when his answer will expose him to penal consequences or forfeiture does not apply where the penalties will be incurred in a foreign country, as "no Judge can know as matter of law what would or would not be penal in a foreign country; and he cannot therefore form any judgment as to the force or truth of the objections of a witness when he declines to answer on such a ground:" *King of the Two Sicilies* v. *Willcox* (1). Even assuming that it can be taken as a plea to the discovery, it is bad from not being pleaded with sufficient certainty. There is nothing to shew that a consignee of goods in this country from the pretended *Confederate Government* is in the same position as an agent, and liable to proceedings under the Act of Congress. The plea gives no information as to the state of the indictment in the *United States* Courts. There is no sufficient allegation of danger to the Defendant, or that the discovery when given in this suit can be material, or will be made use of against the Defendant in the *United States* Courts. All that the plea avers is, that such discovery may be useful to the *United States* in those proceedings. Upon these grounds, therefore, the plea must be overruled as being bad in substance and bad in form.

SIR W. PAGE WOOD, V.C.:—

I think, upon the authorities, that this plea can be sustained as a plea to the relief. I am quite clear that the Court would not compel the Defendant to answer in this case and make discovery as to the matters here alleged, and that, if necessary, the Court would direct the plea to be amended for that particular purpose.

I read the bill as a clear averment on the part of the Plaintiffs that the Defendant was the agent in this country of the so-called *Confederate Government*. The plea sets out an Act of Congress, under which, in order "to insure the speedy termination of the present rebellion" (which the bill avers to have terminated), it is the duty of the President of the *United States* to cause the seizure of all the estate and property of, amongst other persons, "any person hereafter holding any office or agency under the government of the so-called *Confederate States of America*, whether such office

(1) 1 Sim. (N.S.) 301, 329.

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or agency be national, state, or municipal, in its name or character." Then it avers that the Defendant is seised of lands in *America*, and that by virtue of the said Act of Congress proceedings *in rem* have been instituted, and are now being prosecuted in the name of the above-named Plaintiffs, and on their behalf, and with their authority, for the purpose of securing the condemnation and sale of Defendant's lands, and the confiscation thereof, and of the proceeds, for the use of the Plaintiffs, on the ground of the same belonging to the Defendant, and on the alleged ground of his being one of the persons liable under the Act of Congress to have his estate seized, condemned, and confiscated. The plea further avers that the alleged rebellion mentioned in the Act of Congress is the same as that mentioned in the bill, and that the so-called *Confederate States of America* mentioned in the Act of Congress, were and are the same as the pretended government of the *Confederate States of America* mentioned in the bill. Then it states further, that the alleged acts of this Defendant in the bill alleged, and his alleged conduct as agent for and on behalf of the government of the *Confederate States of America*, as in the bill alleged, are also alleged and insisted upon by and on behalf of the *United States*, in the proceedings *in rem* in the District Court, as evidence and in proof that this Defendant was, and is, as constituting him one of the persons named and specified in the said Act of Congress, whose estate and property were liable to be seized and confiscated; and as evidence, and in proof, that the land belonging to the Defendant was liable, and ought to be seized, condemned, and confiscated. The plea further states that no pardon nor amnesty has been extended under the Act of Congress to the Defendant, and that he (the Defendant) cannot answer the interrogatories, or make any answer to the bill, without exposing himself to the condemnation and confiscation of his land and immoveable property, by and for the use of Plaintiffs, the *United States of America*, by means of the said proceedings *in rem*.

Now, taking that to be in proper form a plea to the discovery, it does appear to me that I am not embarrassed by the *King of the Two Sicilies* v. *Willcox* (1), the distinction between that case and this being apparent. There the simple allegation was, that by

(1) 1 Sim. (N.S.) 301.

giving discovery of certain books and papers the Defendants might subject others and themselves to highly penal consequences. The whole of the observations of Lord *Cranworth* go to this extent, that sitting here as an English Judge, he must not be assumed to be in a condition to be able to judge then, there, and at once, upon a general allegation of that description, that which would in this Court be a matter of fact, viz. a question of foreign law, so as to see how far it might be applicable to the case of a Defendant seeking to protect himself from discovery. Here, however, no such difficulty arises. The plea avers (what must be taken to be admitted for the purpose of this argument) not only that there is such a law, but that Plaintiffs are availing themselves of that law to enforce the forfeiture through the medium of proof which this suit, if the interrogatories are answered, will afford them. The plea avers that the suit that is being instituted by these Plaintiffs in *America* is in respect of the Defendant's alleged conduct as agent for the *Confederate States* government, and that the same things are also alleged and insisted upon by the Plaintiffs, the *United States of America*, in a suit there pending, as evidence and in proof that Defendant has forfeited the whole of his real and personal estate, and that, for the purpose of obtaining such forfeiture, Plaintiffs are availing themselves of the proceedings here. Whatever view may be taken ultimately of that very large question considered by Lord *Cranworth*, how far the Court would give weight to an objection by a Defendant to answer, because his answer might subject him to the penalties of foreign law, none of the observations there made can apply to a case like the present. The observation that this Court would not take cognisance of questions of foreign law is answered by the averment in the plea, and the confession by the Plaintiffs (the plea having been set down for argument) that there does exist such a law, and that they are using it against the Defendant for the purpose of effecting a forfeiture. It is difficult to conceive any case to which the maxim "*nemo tenetur seipsum prodere*" will apply with greater force than to this, in which, by the confession of the Plaintiffs, the law does exist, and they are about to avail themselves of it, and the case is as wide apart from that before Lord *Cranworth* as can well be conceived. Nor is there any such

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difficulty as would exist from the Defendant not being subject to the law unless he chose voluntarily to place himself under its jurisdiction by returning to the country against which the offence was committed. No such case as that here arises, because the penalty is forfeiture of land, and he is being attacked on the very ground of being guilty of that of which, if he makes discovery, he says may be liable to convict himself. In that state of things I can have no doubt that the plea must be good to the discovery, and if I had any difficulty about the form in which the plea is pleaded, I ought to allow it to be amended for the purpose of giving an opportunity to the Defendant to protect himself when the consequences are so grave and serious, since all the Courts of this country endeavour to protect a man from criminating himself or subjecting himself to forfeiture.

There may be some doubt as to whether, in point of form, it would be a sufficient plea to the discovery, as it states generally that the Defendant cannot answer the interrogatories without exposing himself to the condemnation, and sale, and confiscation of his property by means of the proceedings *in rem*, and some of the interrogatories have been pointed out putting questions not material to the suit, which may be technically said to be such questions as ought to be answered, and could not form any link in the chain by which the matter may be brought home to the Defendant. I think it might be suggested that there are questions that would not be protected from discovery on the ground of forming such a link.

As regards the plea to relief, I apprehend that in a bill of this kind the forfeiture must be waived before the bill can properly be filed. It is said that a demurrer for want of waiver must always be limited to the discovery. I am not so clear on that point, as the principle that has regulated the waiver of penalties is, that he who seeks equity must do equity. For instance, in a bill by a mortgagor in respect of the mortgaged estate there must be an offer to redeem, or else the bill would be demurrable. In *Godbolt* v. *Watts* (1)—and these old cases, occurring at a time when the Courts were very strict in matters of pleading, are very valuable on the subject—where a surety having brought an action

(1) 2 Anstr. 543.

upon an indemnity bond to recover moneys which he had been compelled to pay on his account, the principal filed a bill in equity for an injunction, and to have the bond delivered up to be cancelled, suggesting fraud, but without offering to indemnify the Defendant—the Court thought that the want of an offer in the bill to make satisfaction to the Defendant was fatal to the bill, and allowed a demurrer. I mention that, among other cases, as illustrations of the doctrine that he who seeks equity must do equity. The waiver of forfeiture is on the same ground. First, as to waste, it is well settled that a Plaintiff cannot obtain discovery in this Court without first waiving his right to treble damages, and that a demurrer will lie to the discovery where there is no waiver. I apprehend a demurrer would also lie to the relief on the same principle, and that the Court would insist upon the Plaintiff's waiving his right to forfeiture before he could ask for any relief in equity.

It has been also held that in suits for tithes the Plaintiff must waive the penalty of the treble value, otherwise his bill will be liable to demurrer, and that on the waiver contained in that bill the Defendant may file a bill to restrain any action for the treble value. This actual waiver seems at one time to have been always required in tithe cases, but in *Wools* v. *Walley* (1) where the bill prayed an account of the single value of the tithes, but did not expressly waive the penalty, it was held that such a prayer would amount to an implied waiver of the treble value, and that an injunction might be granted against suing for the penalty of treble value, as well upon this implied waiver as upon the most express. This at once indicates the principle of the Court that relief in equity shall not be had without a waiver of that which would accrue by forfeiture. It has been carried to the length of implying a waiver, as I have stated, in tithe suits in one instance (the cases are collected in *Daniell's* Chancery Practice (2)), but that by no means altered the general rule as to the necessity of waiving forfeiture. It shews that it does not apply simply to the question of discovery, but equally to relief. The Court has said:—"If you maintain your bill for the single value, we will thereupon estop you from proceeding to assert your remedy for treble value." But it by

(1) 1 Anstr. 100. (2) Vol. i. p. 354, *et seq.* 4th Ed.

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no means follows that a Defendant is not entitled to insist, before the suit proceeds any further, upon the Plaintiff's waiving that other claim which he has against him, and in this case not only a claim which he has, but one which he is actively insisting upon, at the same time that he is seeking equitable relief here on the same grounds. It appears to me, therefore, that this is really a case of the strongest character.

[His Honour referred to the case of *Harrison* v. *Southcote* (1), where Lord *Hardwicke* allowed the plea of the statute 11 & 12 Will. 3, c. 4, disabling Papists from holding land, to so much of the bill as sought to compel a discovery whether one of the Defendants, from whom the other Defendant had purchased, was not a Papist at the time of the conveyance, but disallowed all the other parts of the plea, which went to discovery of title deeds and to the relief.]

The Plaintiffs in this case, as was put very concisely and clearly by Mr. *Benjamin*, say, on the one hand, "Give us all the moneys which you have acquired by the agency;" and on the other hand, "Give us all your estate and property, because you have acted as agent." That is a state of things which a Court of equity cannot allow to proceed. If on the face of the bill the Plaintiffs stated that they were pushing their remedy against this agent, who had been guilty of highly criminal offences against the laws of their state; that they were proceeding against him at this moment to obtain a forfeiture of all his goods and chattels, and if they were at the same time seeking in a Court of equity an account against such agent, and to obtain from him payment of the proceeds of the sale of the goods which he has received as such agent, then I think that would clearly be one of those cases in which the Court would say, "You must take your choice" (as plaintiffs have been made to do with reference to the treble value of tithes and treble damages for waste). "If you like to have your treble value, take it, but do not come here; or if you like to have your ordinary civil remedy, then come here, but waive the treble penalty."

I must therefore allow the plea.

Solicitors: Messrs. *Field, Roscoe, & Francis;* Messrs. *Thomas & Hollams.*

(1) 1 Atk. 528; 2 Ves. Sen. 389.

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May 2.

Company—Amalgamation under Power in the Articles—Company "of a like Nature."

By one of the articles of association of a company registered under the *Companies Act*, 1862, it was provided that the directors might, with the consent of an extraordinary general meeting, "transfer and sell the business of the company, or purchase, or amalgamate with, the business of any other company of a like nature":—

Held, that the above words, even if they authorized the directors, with the consent of an extraordinary general meeting, to dispose of all the assets of the company, were not sufficient to empower the directors, with such consent, to compel a dissentient shareholder to become a member in a new company with more extended objects, nor (*semble*) in any new company at all.

THIS was a motion on behalf of *John Bagshaw* and *William Wigglesworth*, that the register of shareholders of the *Empire Assurance Corporation, Limited*, might be rectified by striking out their names.

In August, 1863, the *City and County Assurance Company, Limited*, was registered with the following objects:—

"1. To insure property of all descriptions against loss or damage by fire. 2. To make and effect assurances on lives and survivorships, or on any contingencies relating to or connected with lives or survivorships, and also to grant, purchase, or sell, endowments, annuities either for lives or for years, or on survivorships, and either immediate or deferred, reversionary or contingent; and also to purchase and sell life, reversionary, and other estates and interests, whether in real or personal property, and generally to undertake and transact all matters and business whatsoever which may be in any way connected with or depend on the contingencies of human life, and which may be undertaken and transacted according to law. 3. To effect any insurance of any kind whatsoever: and, 4. To acquire the business of any other insurance company, by purchase or otherwise, and to carry on such acquired business."

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The capital was £500,000, in £20 shares. By the 60th article it was provided as follows:—

"They (the directors) may also, with the consent of an extraordinary general meeting, transfer and sell the business of the company, or purchase or amalgamate with the business of any other company of a like nature."

In October, 1866, Messrs. *Bagshaw* and *Wigglesworth*, being then the registered holders of twenty-five shares in the company, received a printed notice from Mr. *Ray*, the manager, dated the 1st of October, announcing the intention to hold an extraordinary general meeting, on the 9th, for the consideration of provisional agreements, dated the 20th of September preceding, whereby it had been agreed that the company should be transferred to, taken over by, and amalgamated with, the *Empire Assurance Corporation*, on the principle of the corporation taking to the assets, and taking upon itself the liabilities of the company, and of the corporation giving to the shareholders of the company two shares of £10 each in the corporation, with £2 credited as paid, for every share held by them in the company with £4 paid.

The *Empire Corporation* was registered with the following objects:—

"1. The purchase of the business of the *British Union Assurance Company*, heretofore existing under the *Joint Stock Companies Act*, 1844, and the *Companies Act*, 1862, but not the liabilities of the company, except so far as they relate to the policies now in force. 2. Also the purchase of the business of other assurance companies, and the doing of all such things as are incidental thereto. 3. The business of life assurance in all its branches. 4. The business of an annuity, endowment, or reversionary interest society in all its branches. 5. The business of insurance against sickness and personal accident in all its branches. 6. The business of a loan company in all its branches. Provided that no money of the company be advanced by way of loan, except upon such security as is mentioned in the clauses of the articles of association. Also in like manner the insurance of houses, tenements, and premises of every class and description, against loss or damage by fire, storm, accident, or otherwise, and the transaction of the ordinary business of

a company for insurance against loss or damage by fire. Also in like manner to guarantee or become surety for any person or persons, partnership firm or firms, and the transaction of the ordinary business of a guarantee company. The advancement of moneys at interest to any person or corporations on the security of any freehold, copyhold, leasehold, or other property, wherever situate, or of any estate or interest in any such property. The advancement of moneys to shareholders in the company and others upon the security of, or for the purpose of enabling the person borrowing the same to erect, or purchase, or enlarge, or repair, any dwelling-house, or business premises, or to purchase the fee simple, or any less estate or interest in, or to take a demise for any term or terms of years of any freehold, copyhold, or leasehold property, situate as aforesaid, upon such terms and conditions as the company may think fit. The raising, borrowing, and taking up of moneys at interest. The investment in or on such public funds or government securities as the company may determine of any part of the company's capital not required for immediate purposes."

The 9th article of association was as follows:—

"Any person shall be deemed to have accepted any share or shares in the company after the same shall have been allotted to him on his written application."

The capital was £500,000, in £10 shares.

The above notice was accompanied by a printed letter from Mr. *Ray*, dated the 1st of October, stating the intended amalgamation; and that the terms were specially favourable to the shareholders of the company.

The applicants, who had never before heard of the agreement and proposed amalgamation, did not attend the meeting; and took no step until, on the 21st of November, they received a letter, dated the 20th, from Mr. *Lake*, the general manager of the *Empire Corporation*, stating that the directors had allotted them fifty shares in the corporation, "in accordance with your application, and the deed of arrangement between the *City and County* and *Empire* companies."

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In reply, the applicants, on the 21st, wrote to Mr. *Lake* as follows:—

"We beg to say that we have not made any application for such allotment of shares, and that we should be glad to be informed what are the terms of the deed of arrangement referred to in your letter, and what would be the consequence if we should decline to accept shares in the *Empire Assurance Corporation*."

A reply was sent, promising that Mr. *Lake* would see the applicants, but no meeting took place, and the next communication the applicants received was a letter from Mr. *Lake*, dated the 23rd of January, stating that the certificates of the corporation were ready, and that, on the applicants sending the *City and County* certificates, the others should be forwarded in exchange. In reply, the applicants wrote to Mr. *Lake* on the 24th, offering to sell their *City and County* shares. To this offer no reply was received.

On the 22nd of March, the applicants received by post certificates for fifty *Corporation* shares, with a letter from Mr. *Lake*. They immediately returned the certificates, with a letter dated the 23rd of March, in which they said:—

"We are surprised that you should send us these certificates, when you are well aware that we have never applied for any such shares, or expressed our willingness to accept them. We hope you have not put our names on the register of shareholders. You had no authority to do so."

Upon this Mr. *Lake* wrote, on the 26th of March, as follows:—

"In reply to yours of the 23rd instant, I have to state that the shares you returned to me were allotted in accordance with the deed of amalgamation between the *City and County Assurance Company* and this corporation, and in compliance with a resolution of the former company unanimously passed at their meeting of shareholders."

Petitions dated on or about the 2nd of April, 1867, had been presented, praying for the winding up both of the company and the corporation, but no order had been made at the time of the hearing of this application.

The applicants, on the 10th of April, for the first time learnt

that their names were inserted in the list of the *Empire Corporation* shareholders, and this notice of motion was given on the 18th of April.

The motion was opposed by the provisional liquidator of the corporation.

Mr. *Lake*, by an affidavit in opposition, stated that the resolutions for amalgamation were passed unanimously at the meeting of the 9th of October, 1866; and that the applicants had, on the 23rd of November, 1866, already been made acquainted with all the material conditions of the deed of amalgamation by Mr. *Ray's* circular of the 1st of October, 1866.

Mr. *G. M. Giffard*, Q.C., and Mr. *F. Waller*, for the applicants:—

Although by the articles of a company power is given to the directors to amalgamate, it does not follow that any shareholder of the company is bound, whether he likes it or not, to be a shareholder in the company with which the directors choose to amalgamate: *Higgs's Case* (1).

But here the power is limited. The amalgamation is to be only with the business of another company of a like nature. The *City and County Company* was a fire and life assurance company in the strict sense of the words. The *Empire Corporation*, besides being an assurance company, was an annuity, endowment, and reversionary interest society, an accidental insurance company, and a loan and guarantee society as well.

The letter of the 21st of November was no acceptance of shares on the part of the applicants; and not only was there no written application for shares, which would be necessary to make the applicants liable, but there was distinct repudiation on their part.

In *Los's Case* (2) some sort of distinction was attempted to be drawn between the mode of amalgamation under the 161st section of the *Companies Act*, 1862 (which was the mode of amalgamation adopted in *Los's Case* and *Higgs's Case*, which were both *In the Matter of The Hindustan Bank*, and both decided in June, 1865), and an amalgamation under a power contained in the articles. But the Master of the Rolls found it unnecessary to go into that question, considering that Mr. *Los* was entitled to have his name removed.

(1) 2 H. & M. 657. (2) 13 W. R. 883. 11 Jur. N. S. 661.

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In the case of *The National Financial Corporation* (1), where there was a power in the articles to buy up other companies, and to amalgamate, the Master of the Rolls intimated that a dissentient shareholder would not be bound by any such amalgamation as was there carried out; thus following *Higgs's Case* (2).

Mr. *Druce*, Q.C., and Mr. *D. L. Alexander*, for the liquidator of the corporation:—

This is a matter of contract. By the 60th section, the directors are empowered, with the consent of an extraordinary general meeting, to amalgamate with the business of any other company "of a like nature." These four last words of course apply to the word "company," not to the word "business." Of course the *City and County* could not have amalgamated with a railway company, but if the objects of the two are generally the same, it does not follow that every article of the amalgamated companies must be identical. Although the *Empire Corporation* does include a guarantee business and others amongst its objects, yet the *City and County Company* has power to lend money on any security, and to transact all business that is ordinarily collateral to the business of an assurance company. The two companies are, therefore, of a like nature.

Higgs's Case was under the 161st section of the Act, and has nothing to do with the present, where the amalgamation is under the articles. By the statute the shareholder is allowed seven days within which he may express his dissent. That is different from the case where the company, by virtue of its articles, has an inherent power to amalgamate. *Higgs's Case* also was an instance of the sale and purchase of a company upon certain fixed terms; not of an amalgamation, which is this case.

The applicants upon receiving notice did not refuse to have anything to do with the corporation. They simply wrote to ask what would be the consequence of their refusing. It has been said that an application in writing for shares was necessary in order to make the applicants liable. That is not so; application for shares in the original *Empire Corporation* was rendered necessary by the articles; but not in an amalgamated company, the shareholders in which are absolutely bound by the deed of amalgamation. When the appli-

(1) M. R. June 23, 1866. (2) 2 H. & M. 657.

cants wrote refusing to accept, their refusal came too late. The corporation might have disposed of the shares elsewhere had they been informed in time.

SIR W. PAGE WOOD, V.C. :—

I think it is impossible to give to the word "amalgamate" the force which is contended for. It is difficult to say what the word "amalgamate" means. I confess at this moment I have not the least conception of what the full legal effect of the word is. We do not find it in any law dictionary, or expounded by any competent authority. But I am quite sure of this, that the word "amalgamate" cannot mean that the execution of a deed shall make a man a partner in a firm in which he was not a partner before, under conditions of which he is in no way cognizant, and which are not the same as those contained in the former deed. It is true that in this instance partners, engaged in a concern for insurance of a particular character, have authorized their directors to amalgamate with another company. It is possible that this authority may go thus far; it may empower the directors, without being called to account for so doing in this Court, or by any other jurisdiction, to sacrifice, or to give up (which implies something more), the whole of their business, and to transfer their assets, if they think fit, to some other company, allowing that other company to carry on the business on the best terms they can make with them. In carrying out this, the directors may possibly be authorized by the clause to say, "You who do not like this arrangement must simply lose; we have amalgamated one company with the other" (which seems to be a process of annihilation or extinction rather than anything else), "and we have placed all your assets in the hands of another concern." But that does not imply that the dissentient shareholders, besides losing all their assets, are personally bound to take their part and lot in the new concern. It is one thing to say (not "probably," but), "Possibly you may find all the assets gone, and your shares of no value;" but it is a prodigious step further to say that a dissentient shareholder, having been concerned in an insurance company, shall be obliged to become subject to all the liabilities of another company which is not only an insurance company but a guarantee company, and a company for

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the purchase of houses and various other things as well. I am here assuming that the words of this clause are large enough to embrace all the assets of one company, and mix them up with those of another.

Now, I will take the observations of the Master of the Rolls in preference to any which I have made myself. In *Los's Case* (1) the objection was, that the shareholder had not given notice of his dissent within seven days, according to the 161st section of the Act. The shareholder has a right to have his shares paid in a certain manner, if he gives notice within seven days, and the decision of the Master of the Rolls was simply this, that if he does not give notice of dissent within that period he is still a shareholder. The Master of the Rolls lays this down as a principle: he says, "Suppose he does neither. Why, then, because he is at liberty, upon giving notice within seven days to have his shares paid for, is he to be compelled to take shares which he dissents from taking, and which he has always said nothing shall induce him to take, and of which he disapproves entirely? It would be impossible, in my opinion, to hold, under words of this description, so vast an understood meaning as to alter the whole of the settled law upon the subject, viz. that you cannot force a man against his consent to take shares in an undertaking which he never consented to take."

Here, I apprehend, the applicants have never consented to take shares in this company, unless they consented under the words whereby they authorized the directors to amalgamate, and to execute all necessary deeds for the purpose. Now, no doubt people are very foolish, and I dare say if express words were put into a deed, under which subscribers to company *A.* purported to give their directors full power to make them subscribers to company *B.*, *C.*, or *D.*, plenty of people would be found ready to execute such a deed. But I think this much may be said, that persons who execute these deeds ought to know that the word "amalgamate" is not a word by which, having subscribed to company *A.*, they may be compelled to become subscribers to company *B.* It is just possible that directors may, under this clause, be justified in transferring all the assets of a dissentient

(1) 12 L. T. (N.S.) 690, 694.

shareholder to another company, but it does not appear to me that these words go to anything like the extent of saying that the applicants in this case shall be put on the list of a totally different concern, to being members of which concern they entirely object.

As to the question of laches, the matter stands thus: The applicants received a notice of a meeting for performing this process of amalgamation, and then they had a paper sent to them which told them that the process of amalgamation had been agreed upon, as it was supposed on very advantageous terms; and that the shareholders and directors of the new company had agreed to give as many shares in exchange for so many other shares in the old company. That implied nothing more than this: that there was an agreement by force of which if the shares were not exchanged at once they would be utterly valueless; and that if the applicants wanted shares in the new company they would get them upon handing over their shares in the old company. Upon the shares being offered to them, the applicants immediately objected, or, rather, they said they wanted to know more about it. Then they were told that the gentleman was absent who could give the information required; at last the certificates were sent, and the applicants declined them. After that, I apprehend, there is no laches that can be spoken of, because, after declining the shares, the applicants in the same letter say, "We hope you have not put our names on the register." That letter is not answered; but the applicants' names are immediately placed on the register as shareholders. I cannot hold that they were bound to go in the month of January and see that they were not on the register. I think, therefore, they are not, and cannot be held to be, members of this new company.

There will be an order that the applicants' names be removed; the costs of both parties to come out of the estate of the corporation.

Solicitors for the Applicants: Messrs. *Johnson & Weatheralls.*
Solicitor for the Liquidator: Mr. *Kimber.*

V.-C. W.
1867
June 5.

In re ENGLISH JOINT STOCK BANK.

YELLAND'S CASE.

Company—Manager—Termination of Engagement—Winding-up—Salary—Compensation, how calculated.

Principle upon which the amount for salary and compensation payable to the manager of a company in respect of his engagement, which has been suddenly terminated by the winding up of the company, will be calculated.

THIS was an adjourned summons upon a claim by Mr. *Yelland*, the manager of the *Bideford* branch of the *English Joint Stock Bank, Limited*, before its winding up, for salary and remuneration.

Upon the purchase, in 1865, by the bank, of the business of a bank in *Bideford*, of which Mr. *Yelland* was the manager, he was, under articles of agreement, dated the 20th of October, 1865, engaged as sole manager of the *Bideford* branch of the *English Joint Stock Bank* for a term of five years, from the 1st of July, 1865, at a stipend of not less than £500 a year, payable monthly (the first payment to be made on the 1st of August, 1865), but to be considered as accruing *de die in diem*. It was also provided that, whilst Mr. *Yelland* should continue to act as manager of such branch bank, he should have the right of occupying the bank premises as a dwelling-house, free of all rent, taxes, and other outgoings. Mr. *Yelland*, on his part, agreed that he would, unless prevented by ill-health, during the term of five years from the 1st of July, 1865, if he should so long live, devote his time and attention, within the usual business hours for banking purposes, to manage the said branch bank; with liberty, nevertheless, to act as agent for the *West of England Insurance Company*, or any other insurance company, and to carry on the business of a ship and insurance broker, as theretofore, and that he would diligently and faithfully employ himself in the business thereof, and endeavour to promote the success and extension of such business by all means in his power.

Mr. *Yelland* acted as manager of the *Bideford* branch of the bank until the 11th of May, 1866, when it stopped payment: an

order being made for winding it up on the 25th of May, 1866. On the 1st of August Mr. *Yelland*, who had after the winding-up order continued to act in the affairs of the bank, received a notice from the official liquidator that his engagement was at an end, and that his services would no longer be required; with a request that he would send in the particulars of any claim he had against the bank.

Mr. *Yelland* sent in a claim for £1958 for three years and eleven months' salary, at the rate of £500 a year, and the further sum of £360, being equivalent to £120 a year, for three years' residence and offices on the bank premises free of rent, rates, and taxes, calculated from the 24th of June, 1867, when he would have to vacate the premises.

Mr. *Willcock*, Q.C. (Mr. *W. Pearson* with him), in support of Mr. *Yelland's* claim.

Mr. *Kay*, Q.C., and Mr. *Lindley*, for the official liquidator:—

The result of the authorities is summed up in *Smith's* Leading Cases (*Cutter* v. *Powell*) (1), to this effect, that a clerk or agent who has been wrongfully dismissed has his election of three remedies: "1. He may bring a special action for his master's breach of contract in dismissing him, and this remedy he may pursue immediately. 2. He may wait till the termination of the period for which he was hired, and may then perhaps (though it is now settled by *Goodman* v. *Pocock* (2) that he cannot do so) sue for his whole wages in *indebitatus assumpsit*, relying on the doctrine of constructive service. 3. He may treat the contract as rescinded, and may immediately sue on a *quantum meruit* for the work he actually performed, but in that case, as he sues on an implied contract arising out of actual services, he can only recover for the time that he actually served."

Applying these principles, Mr. *Yelland* cannot be entitled at once to claim the full salary for the whole term for which he was engaged.

SIR W. PAGE WOOD, V.C.:—

I think the proper course will be to ascertain the present value of an annuity of £500 terminating on the 1st of July, 1870, and a

(1) Vol. ii. p. 1, 38, 4th Ed. (2) 15 Q. B. 576.

V.-C. W. 1867 YELLAND'S CASE.

proper rent for the bank premises for the rest of the term, regard being had to the risk to health and life. From this amount something will have to be deducted for Mr. *Yelland* being at liberty to obtain a fresh appointment, and regard must also be had to the liberty reserved to him by the agreement of acting as agent for other companies. The matter will go back to Chambers for calculation, upon this principle.

Solicitors: Mr. *Mark Shephard;* Messrs. *Linklaters, Hackwood, & Addison.*

V.-C. W. 1867 *June* 4, 5, 7.

EARL OF STAMFORD *v.* DAWSON.

Taxation—Scale of Costs—Order XXXVIII. *rule* 2*—Regulation as to Solicitors' Fees and Charges.*

17 Eq 545-6
9 Ch 514-5
7 C.L.D. 348
22 C.L.D. 475
24 Ch.D. 596

The costs of a suit for the purpose of establishing a right to property against an alleged agent, who has denied the agency, and claimed the property as his own, do not come within the lower scale; although the property in question is under the amount or value of £1000.

Principles on which the Regulations as to Solicitors' Fees and Charges are to be construed, discussed.

THIS was an adjourned summons on behalf of the Defendant for review of taxation of costs in the cause.

There were several objections, the only one of general importance being, that the Master should have taxed the costs on the lower scale. The Taxing Master, in disallowing this objection, had answered as follows:—

"This suit was instituted to obtain the declaration of the Court that the Defendant was a trustee for the Plaintiff of an agreement dated the 16th of January, 1861, relating to certain premises, called *Shakespeare House*, and stables; and also of an agreement relating to a certain tract of heath ground called the *Chippenham Gallop;* and that the Defendant might be decreed to deliver up to the Plaintiff possession of the said house, and stables, and gallop; and be charged with a proper occupation rent for the said premises; and that the damages sustained by the Plaintiff by reason

of the Defendant having retained possession of the said premises, or otherwise, might be assessed and ascertained; and that the Defendant might be decreed to pay to the Plaintiff the amount of such occupation rent and damages; and the bill also prayed that, if necessary, a receiver might be appointed of the rents and profits of the said house, and stables, and gallop, and that, if necessary, the Defendant might be restrained from prosecuting an action at law" (so far as the same related to the Defendant's claim) "for use and occupation of the said" (last-mentioned) "premises." The General Order of the 30th of January, 1857" (now G. O. XXXVIII. rule 2) "sets forth in the 2nd section" (now 2nd Reg. sect. 1) "the several suits or proceedings in respect of which costs are to be charged on the lower scale; and the 3rd section of the same Order" (now 2nd Reg. sect. 2) "directs that in all other cases solicitors are to be at liberty to charge on the higher scale. This suit does not appear to me to come precisely within any of the cases specified in the 2nd section. I consider the 3rd section applicable to it, and therefore I have taxed the Plaintiff's costs on the higher scale. For this reason I have disallowed the first objection."

By the decree made at the hearing, on the 28th of May, 1866, the Court declared that the Defendant was a trustee for the Plaintiff of the first-mentioned agreement, and directed accounts, charging the Defendant with an occupation rent of *Shakespeare House* and stables, and payment of the balance, and ordered delivery up of possession of the same premises within one month; also that, so far as the bill sought relief as to *Chippenham Gallop*, it be dismissed, without prejudice to any action at law by the Plaintiff; and that the Defendant do pay the Plaintiff's costs up to and including the hearing, except so far as they might have been increased by the claim in respect of *Chippenham Gallop*, with liberty to apply.

The value of the unexpired term of the agreement for *Shakespeare House* and stables (four and a quarter years), was estimated by a valuer on behalf of the Defendant at £127 10*s.*; and of the agreement for *Chippenham Gallop* at not more than £30.

Mr. *Phear*, for the Defendant:—

It is undisputed that the value of the property in this case

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is below £1000. Then upon what principle can the costs of the suit be taxable on the higher scale? The prayer of the bill is for a declaration that the Defendant is a trustee for the Plaintiff. What is this but a suit for the execution of trusts within the 2nd paragraph of the 1st section of the 2nd Regulation?

The Master possibly thought that the case was not within sect. 1 of the 2nd Regulation, because the bill prays for an injunction, as in *Reade* v. *Bentley* (1). But the grounds of the decision in *Reade* v. *Bentley* are explained by Vice-Chancellor *Kindersley* in *Gibbs* v. *Gibbs* (2). *Reade* v. *Bentley* was a case of injunction and partnership, where there was no estate or fund. Here there is an estate, the value of which is clearly ascertainable.

Mr. *J. W. Chitty*, for the Plaintiff:—

The 1st section of the Regulation deals with a number of cases, which are very easily definable, in which there is a specific fund to be dealt with. This is a suit of very different character from any specified in that section. It is founded on fraud. The question at issue is not estimable in money amount or value. Besides, here we pray an inquiry as to damages, also for a receiver, and for an injunction, as in *Reade* v. *Bentley*. In a suit instituted to have a trust fund replaced, though the fund was under £1000, the Master of the Rolls did not consider the case within the 1st section: *Grimes* v. *Harrison* (3).

Mr. *Phear*, in reply:—

The case is ruled by the decision in *Gibbs* v. *Gibbs*, which was an interpleader suit.

This is either a suit for the execution of trusts, or a suit for specific performance. In *Clayton* v. *Renton* (4) Vice-Chancellor *Stuart*, in construing the 2nd clause of the 1st section of the *County Courts Jurisdiction Act*, 28 & 29 Vict. c. 99, held that in the expression "in all suits for the execution of trusts in which the trust estate should not exceed in amount or value the

(1) 3 K. & J. 271, 280.
(2) 27 L. J. (Ch.) 577. 4 Jur. N.S. 371
(3) 27 Beav. 198. 5 Jur. N.S. 472
(4) Law Rep. 4 Eq. 158.

sum of £500," the word "trusts" extends to implied as well as to express trusts.

Mr. *Chitty*, in reply, on the case cited.

June 7. SIR W. PAGE WOOD, V.C.:—

In this case the only question I reserved was, whether the scale of taxation should be upon the lower scale, owing to the matter being under £1000, or whether it should be upon the ordinary scale of charges. It is undoubtedly desirable that there should be a uniform course of practice on this subject, although the Regulations give the Court a discretion. The Regulations provide that solicitors shall be entitled to charge, and be allowed, the sums mentioned in the lower scale, unless the Court shall make an order to the contrary. Having had a considerable share, with Lord Justice *Turner*, in framing this Order, I know the difficulties which presented themselves in settling any Regulation at all upon this subject. It was thought at one time that the difficulties would be insuperable; but I am happy to say the cases are very few which have arisen by way of contest upon the construction of this Order. The difficulty was in fixing a definite sum, and saying in what way the definite amount in respect of which the litigation had arisen, was to be ascertained.

In administration suits, and in suits for specific performance (which are expressly mentioned in the Regulation), where there is a definite fund to be administered, or a definite sum to be paid, it was easily understood that no matter for grave consideration was likely to arise. Then again, as to suits where the subject in dispute is really a matter of £1000 value simply, and nothing else, it does not follow that, because a prayer for an injunction is tacked on to the prayer of the bill, therefore the case is to be taken out of the lower scale. But in cases of injunctions to prevent further injury, such as that of *Reade* v. *Bentley* (1) before me, it is impossible to estimate what the damages may have been. For

(1) 3 K. & J. 271.

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example, what may have been the damages of pirating a copyright, or an invention, or the like? There is not a word in the Regulation, and I happen to know it was not intended that there should be, which will touch a case of that kind.

The case before me is more difficult, because it stands thus:— It has reference to establishing a case against an agent who purchased, as I held in the result of the suit, on behalf of the Plaintiff, but who denied the agency, and asserted a right to hold the property for himself. The property itself is not worth more than £1000. The circumstance that damages are asked for does not, I think, vary the case. It is quite true that it has been decided, and, if I may say so, quite correctly, that, in settling the scale of costs, you are to estimate the amount which is in dispute, and not how much has been recovered. There may be a claim of £2000, and it may fail as to £1000, but that does not make the suit less a suit for £2000. If specific damages had been laid, the case would have been very different; but here it is simply alleged in the bill that the Plaintiff has sustained damage, not averring any particular amount; and under these circumstances it is necessary to consider the question upon principle.

Looking at the whole of the Regulation, it is easy to see that what is aimed at is, first, all suits by creditors, legatees, devisees, and so on, where the estate in respect of which the demand is made shall be under the amount or value of £1000. That was intended to meet a case where the debts might be £10,000, by providing that if the estate be only £1000, the taxation is to be on the lower scale, in order to relieve suitors who have to deal with sums of that smaller amount. The next is simple execution of a trust, where the trust estate is under £1000. Foreclosure, or redemption, is the next, which, of course, again is a matter which can be measured. Then suits for specific performance, in which the purchase-money, or consideration, shall be under the amount of £1000. Then come proceedings under the Trustee Acts in the same way, where the trust estate or fund shall be under that amount. Then all proceedings relating to the guardianship of infants, where the property of the infant is under £1000. Then, seventhly, all proceedings in special cases relating to funds carried to separate accounts, and several other things of that kind, and generally "all

other cases" where the estate or fund to be dealt with shall be under the amount or value of £1000.

Now, it cannot be said that we are here simply confined to administrative matters. There may be a dispute: in a suit for foreclosure there may be a question as to the right to redeem, or the right to foreclose; or in a suit for specific performance, there may be a contest as to the right to compel the fulfilment of the agreement. Therefore I cannot hold that the Regulation is confined to cases which are in the nature of simple administration, but considering this seventh class as having far more relation to funds which are ready and waiting to be dealt with according to the rights of the parties than anything else, and looking at the cases which are enumerated, I must agree in the opinion expressed by the Master of the Rolls in *Grimes* v. *Harrison* (1), that the Regulation has no application to a case where fraud arises, or to a case like this, where a vast amount of the expense incurred—in fact, the whole expense of the suit—has no relation at all to the value of the property, but arises out of the denial of agency on the part of the Defendant, who says that he purchased for himself, and insists upon holding for himself. It is not a case in any way analogous to specific performance.

My own opinion of the construction of the Order is, that it is not intended to apply to cases which equity would regard as fraud, such as denial of agency, and the like, where the whole expense and burden of the suit are in respect of such subject matter; but it is intended to apply to those cases, simple enough in themselves, where there may be, wholly irrespective of fraud, as in foreclosure, or in specific performance, a question whether there is a mortgage, or a contract, or the like. It does not appear to me that it was in any way intended by this Order to excuse parties who may be found to enter upon extensive and heavy litigation in respect of denying duties and trusts which have been confided to them, and to place them in a position to say that, as against the adverse party, they will only allow him to demand costs upon the lower scale.

I should be very unwilling to exercise the discretion reposed in the Court, simply on the basis of those words, "unless the Court

(1) 27 Beav. 198. 5 Jur. (N.S.) 972

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shall make order to the contrary." That was a discretion which was meant to meet any possible case of hardship which could not be definitely struck at by the rules; but I conceive I am justified in giving this construction to the rule—that having regard to the clauses which enumerate the specific cases to which it was intended the Regulation should apply, this case does not come within the Regulation; not being a specific case, and not being within the phrase "in all other cases where the fund to be dealt with is under £1000."

It is a question of some little difficulty and anxiety, but, on the whole, I think this is a suit in which the costs must be taxed on the ordinary scale.

Solicitors for the Plaintiff: Messrs. *Aldridge, Bromley, & Thorn,* agents for Messrs. *Kitcheners & Fenn, Newmarket.*

Solicitor for the Defendant: Mr. *T. Gill.*

STOCKDALE *v.* NICHOLSON.

V.-C. M.
1867
June 5, 25.

Construction of Will—Next Personal Representative.

A testator gave £2000 in trust for his daughter for life, with remainder to her children; and, if she should die without issue, then "to the next personal representatives" of the daughter so dying as aforesaid.

The daughter died without issue, leaving a husband, a brother and sister, and a niece surviving:—

Held, that the brother and sister, as the nearest of kin, were entitled as joint tenants.

THIS was a special case, the object of which was to obtain the opinion of the Court on the ultimate limitation, in a codicil to the will of *Thomas Peacock*, to the next personal representatives of his daughter.

The testator, by his will, dated in 1822, gave all his real and personal estate to his son, subject to the payment of his debts and legacies, and he gave a legacy to his daughter *Mary Ann* of £3000, to his daughter *Harriett*, £2000, and to his daughter *Maria*, £3000, when she should attain the age of twenty-one years. By the will those legacies were given absolutely; but by a codicil, upon which the question turned, the testator, after reciting the bequest contained in his will in favour of the daughters, continued: "Now I, the said *Thomas Peacock*, having maturely considered the several bequests before given unto my said three daughters, *Mary Ann Peacock*, *Harriett Ketwiah Walter*, and *Maria Peacock*, and the necessity of making a permanent provision for each and every of them, and their respective families (in case they shall have any), do hereby order and direct that the sum of £2000, part of the said legacy of £3000 given unto my daughter *Mary Ann Peacock*; also the said sum of £2000 given unto my daughter *Harriett Ketwiah Walter*; and also the sum of £2000, part of the said legacy of £3000 given unto my daughter *Maria Peacock* when she shall attain the age of twenty-one years, shall be paid into the hands of *Robert Duckle* and *William Cross*, trustees appointed by this my codicil." He then directed that the said legacies should be held in trust for the daughters for life, with the remainder to

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their children; and if they should die without issue, then it was to be paid to such person or persons as the daughter should appoint; and in default of appointment, "to the next personal representatives of such of them so dying as aforesaid."

The testator died in 1824. *Mary Ann Peacock* married *William Ashton*, and survived her husband. *Harriett Ketwiah Walter* died, leaving her husband surviving and one child, *Frances Maria*, who married *W. J. Nicholson*. *Maria Peacock* married *Joseph Cheesbrough*, and died in 1844, without leaving issue, and without having exercised the power of appointment given her by her father's will. *Joseph Cheesbrough*, by a deed, dated in 1848, assigned all his interest in right of his wife in the legacy of £2000 to *Edward Shaw Peacock*, subject to his own life interest therein. *Joseph Cheesbrough* had since died. *Edward Shaw Peacock* died in 1861, leaving *Edward Peacock* his personal representative. *Mary Ann Ashton* died in 1866, having, by her will, bequeathed her interest in Mrs. *Cheesbrough's* legacy under the will, to the Plaintiffs as trustees for the benefit of *Frances Maria Nicholson* and her issue.

The only question now to be determined was, who, at the death of *Maria Cheesbrough*, became entitled to the capital of the legacy of £2000, of which she was tenant for life, under the codicil to the will of Mrs. *Peacock*.

Mr. *Baily*, Q.C., and Mr. *W. Pearson*, for the Plaintiffs, who represented the interest of *Mary Ann Ashton*:—

The question which arises under this codicil is, who are to take the share of Mrs. *Cheesbrough* under the words "next personal representatives." If they are to be construed as meaning executors and administrators, then the husband of Mrs. *Cheesbrough* became absolutely entitled, and his assignees, or those who represent them, would now be entitled to the whole fund. If, on the other hand, the words are held to mean nearest of kindred, then upon the death of Mrs. *Cheesbrough*, her sister *Mary Ann Ashton*, and her brother, *Edward Shaw Peacock*, were her nearest of kin, and, as such, became entitled as joint tenants, subject to the life interest of *Joseph Cheesbrough*; and *Edward Shaw Peacock* having died without severing the joint tenancy, the whole of the legacy survived to *Mary Ann Ashton*, and the Plaintiffs are now entitled

under the trusts of her will. But if the Court should be of opinion that the nearest of kin meant next of kin under the *Statute of Distributions*, then *Mary Ann Ashton*, the sister, *Edward Shaw Peacock*, the brother, and *Frances Ann Nicholson*, the niece, who were such next of kin at Mrs. *Cheesbrough's* death, would have become entitled as tenants in common, and in that case the Plaintiffs would now be entitled to one equal third part under the trusts of Mrs. *Ashton's* will.

In the case of *Withy* v. *Mangles* (1) the gift was "to such person or persons as at the time of the death should be the next of kin of the legatee." The legatee left her husband, and a child, and a father and mother, surviving; and it was held that the child and father and mother were equally her next of kin. *Booth* v. *Vicars* (2) was a case exactly resembling this, where the words were, "to go and be equally divided to and amongst the respective next legal representatives of *A.* and *B.*, share and share alike;" and Vice-Chancellor *Knight Bruce* held that the next of kin, according to the statute, living at the death were entitled to the fund *per stirpes*. The gift in *Robinson* v. *Smith* (3) was "to the personal representatives" of the daughter, and the Vice-Chancellor of *England* decided that the next of kin took to the exclusion of the husband. So also in *King* v. *Cleaveland* (4), where the gift was "amongst the testator's nephews and nieces, or their legal personal representatives," the representatives were held to be the next of kin, and not the executors or administrators of the nephews and nieces. In *Brandon* v. *Brandon* (5) the words were, "to the nearest and next of kin of the wife in equal shares," and Sir *Thomas Plumer* decided that the brother of the wife was entitled in exclusion of nephews and nieces, considering that though nephews and nieces were admitted in that character under the *Statute of Distributions*, there was nothing to shew that the parties meant to refer to the statute; the words were too explicit and definite to admit, for their construction, reference to the statute. *Downes* v. *Bullock* (6), confirmed on appeal (7), was not a case that could

(1) 10 Cl. & F. 215.
(2) 1 Coll. 6.
(3) 6 Sim. 47.
(4) 4 De G. & J. 477.
(5) 3 Sw. 312.
(6) 25 Beav. 54.
(7) 9 H. L. C. 1.

V.-C. M. 1867 STOCKDALE v. NICHOLSON.

be used as an authority against the Plaintiffs' contention. The words were, "in default of children of the tenant for life, then to the persons of the blood or next of kin of the testator as would by virtue of the *Statute of Distributions* have become and been then entitled thereto in case the testator had died intestate;" and it was held that the word "then" applied to the death of the testator and not of *A.*, but that the class took as tenants in common as they would have taken under the statute. The reference to the statute was held to point out not only the class, but the manner in which they took. In this case there is no reference to the statute, and nothing to induce the Court to hold that the next of kin are to take as tenants in common.

Mr. *Glasse*, Q.C., and Mr. *Cates*, for the Defendants, *William John Nicholson* and *Frances Maria Nicholson*:—

We contend that *Mary Ann Ashton*, *Frances Maria Nicholson*, and *Edward Shaw Peacock*, as the persons who were the next of kin, according to the statute, of *Maria Cheesbrough* at her death, became entitled on her death as joint tenants to the £2000, subject to the life interest of *Joseph Cheesbrough*; and in that case, as *Edward Shaw Peacock* and *Mary Ann Ashton* died without severing the joint tenancy, the Defendant, *Frances Maria Nicholson*, or *William John Nicholson* in her right, is now entitled to the whole of the legacy; but if the Court should not put that construction upon the words, then we submit that the second contention of the Plaintiffs is correct, and that the Defendant, *Frances Maria Nicholson*, or *W. J. Nicholson* in her right, is now entitled absolutely to one equal third part of that sum.

In *King* v. *Cleaveland* (1) the gift was, after the death of the tenant for life, "to his children then living, or their legal personal representatives, share and share alike," and it was held that the next of kin took as a distinct class, and included the representatives of the children who died in the lifetime of the testator, and of those who were dead at the date of the will. In *Walker* v. *Marquis of Camden* (2), the words "legal representative or representatives," were held to mean, not executors or administrators, but

(1) 26 Beav. 26. (2) 16 Sim. 329.

next of kin, and that they took as joint tenants. In *Jarman* on Wills (1), it is stated that in numerous cases the term "legal representative," or "personal representative," has been construed as synonymous with "next of kin," as descriptive of the person or persons taking the personal estate under the *Statute of Distributions*. It was held in *Elmsley* v. *Young* (2) that the words "next of kin," without explanatory context, must be taken to mean next of kin according to the statute; therefore, if the words in this will mean next of kin, there is nothing to shew that they are not to be construed as next of kin according to the statute. These express words, however, were adjudicated upon in the case of *Booth* v. *Vicars* (3), and if that case is good law, the next of kin under the statute must take in this case, and the niece will then be entitled. In *Booth* v. *Vicars*, the words "share and share alike" were added, and it was held that they took as tenants in common, but in *Withy* v. *Mangles* (4) the House of Lords decided that the next of kin were entitled in joint tenancy. The case of *Doody* v. *Higgins* (5) also supports our view of the case, where it was held that the words "or their heirs for ever," in a bequest of personalty, meant those who, under the *Statute of Distributions*, would have been entitled to the personal estate.

Mr. *C. Hall*, and Mr. *Marten*, for the Defendant, *Edward Peacock*:—

The words of this will should be construed to mean executors and administrators, and upon the death of *Maria Cheesbrough*, *Joseph Cheesbrough*, her surviving husband, became beneficially entitled to the capital of the £2000, subject to his own life interest therein, and in that case the beneficial interest in the legacy passed on his death to *Edward Shaw Peacock*, by virtue of the indenture of assignment of May, 1848, and is now vested in the legal personal representatives of *Edward Shaw Peacock*. Two propositions are to be deduced from this will and codicil: First, that the words "personal representatives" must be construed in their primary sense as meaning executors or administrators. The second

(1) 3rd Ed. vol. ii. p. 98.
(2) 2 My. & K. 82.
(3) 1 Coll. 6.
(4) 10 Cl. & F. 215.
(5) 2 K. & J. 729.

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is, that where there is a gift of personalty to one for life, followed by a gift to the personal representatives, or legal representatives, or legal personal representatives, of the tenant for life, those words are to be construed as meaning executors or administrators, and are words of limitation. There is nothing in this will to prevent the words from having the natural construction put upon them, which would be executors or administrators.

The cases in which the Court has put this construction upon them are *Smith* v. *Barneby* (1); *Re Crawford's Trusts* (2); *Saberton* v. *Skeels* (3); *In re Wyndham's Trusts* (4); *Alger* v. *Parrott* (5); *Re Henderson* (6); *Baines* v. *Ottey* (7); *Leak* v. *MacDowell* (8); *Chapman* v. *Chapman* (9); *Re Turner* (10); *Walter* v. *Makin* (11); *Hinchliffe* v. *Westwood* (12); *Doody* v. *Higgins* (13); *Topping* v. *Howard* (14); *Robinson* v. *Smith* (15).

In nearly all these cases the words were similar to the words now before us, and they were construed to mean executors or administrators, and frequently expressions were used by the Judges who decided them to the effect that the ordinary sense of the words "personal representatives," or "legal representatives," or "legal personal representatives," is "executors or administrators."

Mr. *Nalder*, for a trustee.

Mr. *Baily*, in reply:—

I admit that the primary meaning to be put upon the words "legal personal representatives" would be "executors or administrators," but where there is any expression to control this meaning, then they are subject to a different construction. But the words here are "next" personal representatives, and it is a fair inference from the use of the word "next" that the ordinary construction should not be given to the expression. "Next" or "nearest" always

(1) 2 Coll. 728.
(2) 2 Drew. 230.
(3) 1 Russ. & My. 587.
(4) Law Rep. 1 Eq. 290.
(5) Ibid. 3 Eq. 328.
(6) 28 Beav. 656.
(7) 1 My. & K. 465.
(8) 33 Beav. 238.
(9) Ibid. 556.
(10) 2 Dr. & Sm. 501.
(11) 6 Sim. 148.
(12) 2 De G. & Sm. 216.
(13) 2 K. & J. 729.
(14) 4 De G. & Sm. 268.
(15) 6 Sim. 47.

implies a relationship of blood, which cannot be said of "executors or administrators," and on that ground I put the case, and all the authorities in which the words "personal representatives," "legal representatives," or "legal personal representatives," occur simply, may be thrown over as having no application to this case. The word "next" has no signification when applied to "executors or administrators," and therefore it must mean persons in some way connected in blood. Then it comes to the only question whether the words are to be construed as meaning "nearest of kin," including only the brother and sister of the deceased, or whether they are to be held as implying "next of kin" according to the statute? and I submit that the authorities are in favour of the former construction.

June 25. SIR R. MALINS, V.C.:—

It may be said that the words "personal representatives," or "legal representatives," or "legal personal representatives," when applied to personal estate as is frequently said of the word "issue" when applied to real estate, are words of limitation or words of purchase as will best effectuate the intention. But I think it may now be considered as settled that any of those words when applied to personal estate, unaccompanied by explanatory or controlling words, are to be construed as being equivalent to "executors and administrators," and, consequently, as words of limitation, when they follow a limitation for life to the person to whose representative the property is given, and as a gift to the "executors and administrators" in that capacity when there is no such limitation.

I will take the cases in the order in which they were cited by Mr. *Marten*, that is, upon the argument that the words mean "executors and administrators." In *Smith* v. *Barneby* (1) the trust was (and that is the ultimate limitation of the will), "for my personal and not my real representatives," and the Vice-Chancellor read those words as meaning executors and administrators. In that case, the limitations of real estate were wound up with limitations to the

(1) 2 Coll. 728.

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testator's right heir, and therefore the words "personal representatives" were construed by the Vice-Chancellor as equivalent to representatives or heirs of personal estate.

In *Re Crawford's Trusts* (1) the residue of the testator's estate was given to the testator's daughter for life, and upon her death one twelfth was to be equally divided among "all my cousins german now existing, or their representatives." It was held to mean executors. Vice-Chancellor *Kindersley* there held that "representatives" primarily means "personal representatives," and that the onus of shewing that it has some other meaning lies upon those who assert it.

In *Saberton* v. *Skeels* (2), which is a leading case upon this subject, the limitation was for the daughter for life, and then as she should appoint; and in default of appointment to go to her personal representatives. It was held that the executor was entitled. Sir *John Leach* there says, that the ordinary sense of the words "personal representatives" is "executors and administrators."

In *Re Wyndham's Trusts* (3), a recent case, the gift was to the testator's daughter for life, with remainder to her children equally; and if no issue, to be paid to her personal epresentatives. The event was that there was no issue, and therefore the limitation came into operation. It was held by Vice-Chancellor *Wood* that that meant executors and administrators, and in giving judgment he uses this expression: "It seems well settled that the words 'personal representative' must, in the absence of other controlling words, which do not appear in this case, be taken to mean a person claiming as executor or administrator."

In *Alger* v. *Parrott* (4), the same learned Vice-Chancellor, in construing this bequest, "£1000 to Mrs. *D.* for life, and at her decease the stock to be transferred to her personal representatives," held that Mrs. *D.* took absolutely, and he uses this expression: "Words having a distinct meaning must bear their primary legal import. I cannot assume a supposed intention of the testatrix contrary to what she says, in the absence of other words to con

(1) 2 Drew. 230.
(2) 1 Russ. & My. 587.
(3) Law Rep. 1 Eq. 290.
(4) Ibid. 3 Eq. 328.

trol the meaning of what she says." In *Re Henderson* (1) the gift was of *East India* Stock to *E. V. Sprang* for life, and (in the event which happened) after her death to "my brothers and sisters, or their representatives." It was held they took absolutely, and there the Master of the Rolls says, "I am of opinion that the word 'representatives' means 'legal personal representatives,' they cannot take beneficially unless there be words, as in *Baines* v. *Ottey* (2), and *King* v. *Cleaveland* (3), which render it impossible so to hold."

In *Leak* v. *MacDowell* (4), there was a gift to the personal representatives of persons who had long been dead, but that proceeded on the principle that the persons to whose personal representatives the bequest was made had lost money by the testator in trade, and therefore, as it proceeds upon a particular circumstance, cannot be said to afford any general rule. In *Chapman* v. *Chapman* (5), there was a bequest of £1400 to *Frances Chapman* for life, and if no children to her brothers and sisters, or their representatives, in equal shares. It was held that the executors and administrators, and the brothers and sisters, took absolutely. In *Re Turner* (6), which was before Sir *Richard Kindersley*, in 1865, the gift was to the daughter for life, and if she died without issue, to the testator's sons, share and share alike. But if any of them died his share to be paid to his children, but if there were no child, then to his legal representatives. It was held to mean executors and administrators, and the sons consequently took absolutely. There Vice-Chancellor *Kindersley* again said the words "representative," or "legal representative," or "personal representative," primarily mean executors and administrators, "and in order to put any other meaning on them, you must find in the context some special reason for so doing."

In *Walter* v. *Makin* (7), and in *Styth* v. *Monro* (8), the construction of "next of kin" was put upon these words by Sir *Lancelot Shadwell*. But these decisions proceeded upon such very special circumstances with regard to the particular words contained

(1) 28 Beav. 656.
(2) 1 My. & K. 465.
(3) 4 De G. & J. 477.
(4) 33 Beav. 238.
(5) 33 Beav. 556.
(6) 2 Dr. & Sm. 501.
(7) 6 Sim. 148.
(8) Ibid. 49.

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in the will, that they again cannot, I think, be quoted as affording any rule for construction.

In *Hinchliffe* v. *Westwood* (1), the gift was to the daughter for life, then to her children, and if none then to go equally among testator's three sons, and in case of the decease of all or any of his said sons in the lifetime of the daughter, then he bequeathed the share or shares to become due upon the contingency aforesaid, of him or them so dying, to his or their legal personal representatives. It was held to mean executors and administrators.

In *Doody* v. *Higgins* (2), the gift was to the wife for life, then to her sister for life, the residue to be divided amongst the following persons, and their heirs for ever. The word "heirs" there was held to mean, "heirs according to the subject matter of the gift," that is "next of kin." In *Topping* v. *Howard* (3), there were three constructions, every one of which led to the same conclusion. It became therefore unnecessary, or unimportant, to decide any one of them, and nothing else was decided, and that case, therefore, is no authority for anything whatever.

But in the cases relied upon by the Plaintiffs' counsel, slight circumstances have been allowed to control the general effect of those words.

In *Robinson* v. *Smith* (4), the first of those cited, the gift was to the daughter for life, and after her decease to the personal representatives. There Sir *Lancelot Shadwell* held that personal representatives meant next of kin. But there the case wholly depended upon the circumstance of the husband being made trustee of the fund, which he was directed to pay to the personal representatives of his wife, and on that ground Sir *Lancelot Shadwell* held that as "personal representative" could not mean himself, it must, therefore, mean the next of kin. I confess I do not think I should have come to the same conclusion. Vice-Chancellor *Kindersley* expresses considerable doubt upon that decision, but for the present purpose it is sufficient to say it proceeded on the ground which does not exist in the present case—namely, that of the husband being made trustee, and therefore does not attempt to impugn

(1) 2 De G. & Sm. 216.
(2) 2 K. & J. 729.
(3) 4 De G. & Sm. 268.
(4) 6 Sim. 47.

the general rule. In *King* v. *Cleaveland* (1), the bequest was, to the brother of the testator for life, and "after the decease of my said brother, and his said wife, then in trust to pay and apply the said sum of £4000 stock equally amongst my nephews and nieces, children of my said brother *Richard Francis Cleaveland*, and his said wife then living, or their personal representatives, share and share alike." The decision turned mainly upon the words "share and share alike," and cannot therefore be treated as an authority applicable to the present case. On referring to the judgment it will be found that the Lord Chancellor *Cranworth* and Lord Justice *Turner* both proceeded upon the ground of the existence of the words "share and share alike," which they considered shewed that the personal representatives were not to take, but that some persons were to take beneficially. In that case Lord Justice *Knight Bruce* entertained considerable doubt, but gave way to the opinion of the majority, on account of the words "share and share alike."

Bullock v. *Downes* (2), which was cited also, is a case which has no application to the present; because the ultimate limitation there was to the persons entitled under the *Statute of Distributions.*

Walker v. *Marquis of Camden* (3) is also one of the decisions of Sir *Lancelot Shadwell,* and proceeded upon very peculiar grounds. The trust there was to pay to the son for life, and to his children, if he had any, and if no children to pay one-fourth to *P.*, if he should be living; then to his personal representatives, and the three remaining fourths were given to other persons in precisely the same manner. Sir *Lancelot Shadwell* there held, that the fact of the words "executors and administrators" having occurred five times in the will, shewed that the testator understood what they meant, and must, therefore, be considered to have thought that "legal representative" meant something else; and, consequently, that it meant next of kin.

In *Baines* v. *Ottey* (4), the gift was to *Mary Knightley* for life, and in default of appointment to and among such person and persons as would be the personal representatives. It was held to mean her next of kin, and, in that case, Lord *Langdale* said, "It has

(1) 4 De G. & J. 477.
(2) 9 H. L. C. 1.
(3) 16 Sim. 329.
(4) 1 My. & K. 465.

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been properly observed that the words 'to or amongst such person or persons as would be the personal representatives of Lady *Knightley*' are not applicable to executors or administrators;" that therefore, is a decision which proceeded also, not upon the words "equally to be divided," but upon words which were equivalent to them, namely, "to and amongst."

But the case which is mainly relied upon by the Plaintiffs, and the Defendants Mr. and Mrs. *Nicholson*, who are in the same interest, is *Booth* v. *Vicars* (1); and that case is so precisely the same as the present, that, its authority never having been overruled, or, indeed, impugned, as to the point I am now considering, I think I am bound to consider it as ruling this case. The gift there was a gift of property to the wife for life, and after her death to be equally divided to and amongst the next legal representatives of *N. Vicars* and *Mary Brown*, share and share alike. Now, it is very true that the words "share and share alike" occur, but it is plain that the Vice-Chancellor *Knight Bruce* did not, in the slightest degree, rest his decision on those grounds; for it was argued by counsel: "They take *per capita*, otherwise they cannot take share and share alike." Then the Vice-Chancellor says: "May not those words refer to the two original *stirpes*, and those alone"? Therefore it is quite clear he considered the words "share and share alike" as referring to *Nicholas Vicars* and *Mary Brown*—that is, to the *stirpes*, and not to the next of kin who are to take. Then he decided that they were to take in two shares. The remaining question was, whether "next legal personal representative" meant next of kin, or did it mean executors or administrators? Now, the Vice-Chancellor, interrupting counsel again in the course of the argument, when counsel said the word "next" must be considered to point to the nearest of kin, said: "That word is only an abbreviation of the word 'nearest.'" Well, then, the words in that case being "next legal representative," here it is "next personal representative." It is impossible there can be any distinction between those two, and the words, therefore, are identical. In that case, the Vice-Chancellor *Knight Bruce* says: "The whole language of this bequest seems to me of necessity to exclude the notion that, under the words 'next legal representatives,' the

(1) 1 Coll. 6.

executors or administrators of *Nicholas Vicars* and *Mary Brown* could take, for the benefit of those executors or administrators themselves, as beneficial legatees. It is impossible to suggest that such a construction could be right." Then, commenting on the case, he says: "In the second place, he has used the word 'next' in combination with the words 'legal representatives,' which is a word having no connection with the character of executor or administrator; and, thirdly, that construction would render the latter half of the bequest mere superfluity, because, supposing that, by the words in question, executors or administrators are meant, the fund would go in the same way without those words as with them. These are part of the considerations which seem to me to exclude that construction also. It follows, if this view of the subject be right, that the words 'next legal representatives' must, in this will, import, in some form, consanguinity. The next question is, in what form?" He then proceeds to argue that, and he comes to this conclusion: "I must, therefore, refer to the *Statute of Distributions*, which points out those who are entitled to claim as the legal representatives in that particular sense of the words. 'Next legal representatives' mean the persons who, by force of law, in right of consanguinity, would take the personal estate of those persons beneficially." The authority of that case has never been impugned, and, it being precisely similar to the present, I am bound to hold that, in this case, the words "next personal representatives" mean "next of kin;" and the Plaintiffs are, consequently, entitled in the manner I have already stated. My view of the case is, that the "next personal representative" means "nearest of kin;" they take as a class, and, for want of words of division, they take as joint tenants. The consequence is, that the whole vested in Mrs. *Ashton*, under whose will the Plaintiffs and Mrs. *Nicholson* are entitled.

There is one point to which I wish to direct counsel's attention. In that case of *Booth* v. *Vicars* (1), Lord Justice *Knight Bruce* held that it was the next of kin, according to the statute, who took; but I think the authorities since that decision are so clear that a gift to the next of kin, as a class, gives a joint tenancy to the nearest of kin, that that is my interpretation of this will. But as that part

(1) 1 Coll. 6.

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of the case was very slightly argued—only adverted to by Mr. *Glasse*—if any party desires to speak to that matter again, upon that point alone, I shall be very happy that he should do so.

Mr. *Baily* considered that the question had been so clearly settled by *Withy* v. *Mangles* (1), and other cases, that it would be hopeless to argue it.

Mr. *Glasse* concurred in this view.

SIR R. MALINS, V.C.:—

In that case the declaration will be, that in the events which have happened the whole of the property became vested in Mrs. *Ashton*, under whose will the Plaintiffs and Mrs. *Nicholson* became entitled. The result I arrive at very distinctly, and, I think, in conformity with all the authorities, that if it had not been for the word "next," the gift would have vested absolutely in Mrs. *Cheesbrough*. It is purely upon the word "next" that I come to the conclusion I have done.

The costs were, by agreement, to be paid out of the legacy of £2000 of which Mrs. *Cheesbrough* was tenant for life.

Solicitors for the Plaintiffs: Messrs. *T. H. & A. R. Oldman.*

Solicitors for the Defendants: Messrs. *Ridsdale & Craddock;* Messrs. *Scott & Co.*

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LOCKE *v.* LAMB.

Construction of Will—"As they shall attain twenty-one"—Period of Vesting.

Bequest of a sum of stock to be divided, after the death of an annuitant, between all the children of *A. B.* as they should attain his or her age of twenty-one years:—

Held, that the fund was to go to such of the children of *A. B.* as were living when the first attained twenty-one, and who had attained, or who should attain, twenty-one.

THIS bill was filed for the purpose of obtaining the opinion of the Court as to the construction of the will of *Anna Locke*, widow,

(1) 10 Cl. & F. 215.

dated the 21st of February, 1839, whereby (*inter alia*) she gave and bequeathed to *Henry Saunders* and *Wadham Locke* £1000 stock in the *Royal Assurance Company, London,* to receive the dividends and increase thereof, and, in the first place, to pay to *Jane Hitchens* (her late servant) an annuity of £15, and the remainder of the dividends, with any increase that might be thereon, to be laid out in the £3 per Cent. Consols, to accumulate during the life of the said *Jane Hitchens,* and upon her death, the dividends of the said £1000 stock to be added to the accumulation in the said £3 per Cent. Consols, and, with the £1000 to be equally divided between all the children of *Wadham Locke,* as they should attain his or her age of twenty-one years; and, after giving certain legacies, the testatrix devised and bequeathed the residue and remainder of her moneys, and real and personal estate, her debts, legacies, and funeral expenses being thereout first paid and discharged, to the said *Wadham Locke,* and appointed him sole executor. The testatrix died on the 31st of July, 1839, leaving *Jane Hitchens* and *Wadham Locke* surviving, *Wadham Locke* at the date of the will, and at the time of the testatrix's death, had two children, *Wadham Locke* and *Caroline Locke. Wadham Locke* (the son) died an infant on the 8th of December, 1842, and no administration had been taken out to his estate. On the 21st of April, 1844, *Wadham Locke,* being a widower, married his present wife, and had by her eight children, of whom four were the Plaintiffs and three Defendants. *Jane Hitchens* died in February, 1847, and *Henry Saunders* in October, 1850, leaving *Wadham Locke* the elder the sole legal personal representative of the testatrix. *Caroline Locke* married *George Henry Lamb,* and attained twenty-one on the 8th of November, 1857. *Robert Locke,* another of the children, died on the 11th of March, 1858, an infant, and no administrator had been appointed of his estate. The Plaintiffs, and Mrs. *Lamb,* and the two deceased children, *Wadham Locke* (the son), and *Robert Locke,* were the only children who were born before Mrs. *Lamb* attained twenty-one. The Plaintiff, *Wadham Locke* the younger, who was a child of the second marriage, attained twenty-one on the 6th of March, 1866, and thereupon became entitled to a share of the £1000 stock and accumulations, and doubts having arisen upon the construction of the will, this

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suit was instituted by *Wadham Locke* the younger, and three of the infant children, against *Wadham Locke*, the father, Mr. and Mrs. *Lamb*, and the other infant children to determine those questions, and came on upon motion for decree.

Mr. *Kenyon*, Q.C., and Mr. *Bush*, for the Plaintiffs:—

Those children only are included in this gift who were born before the eldest attained twenty-one. The line is drawn directly the first attains twenty-one: *Ellison* v. *Airey* (1); *Ayton* v. *Ayton* (2). Had all such children taken a vested interest, it would have been on their birth, although the time of payment was postponed until they attained twenty-one: *Saunders* v. *Vautier* (3); *Hanson* v. *Graham* (4); *Boraston's Case* (5); *Leake* v. *Robinson* (6); *Pearson* v. *Dolman* (7); *Watson* v. *Watson* (8).

Mr. *C. Herbert Smith*, for *Wadham Locke*, the father, who was appointed by the Court to represent the two deceased infants, *Wadham Locke*, the son, and *Robert Locke*:—

In order to exclude the children, who, though born before the eldest attained twenty-one, yet died under twenty-one, from the benefit of the gift the words "as they attain twenty-one," must be construed to be equivalent to "such as should attain twenty-one." They cannot be grammatically so treated, as it is not a limited class of that kind, and the shares of those dying under twenty-one did not accrue to the others or survivors: *Pearman* v. *Pearman* (9). It is true that the words are ambiguous, but where the words are ambiguous, the Court will rather lean to give a vested construction to them; and these words must be construed in the same manner as if there was a direction to divide, and then to pay at twenty-one, the age merely pointing to the period of enjoyment. The testator directs that all the children are to take, and there is no survivorship between them, and no gift over, all tending to shew that the interests are vested at the birth:

(1) 1 Ves. Sen. 111.
(2) 1 Cox, 327.
(3) Cr. & P. 240.
(4) 6 Ves. 239.
(5) 3 Rep. 19 a.
(6) 2 Mer. 363.
(7) Law Rep. 3 Eq. 315.
(8) 11 Sim. 73.
(9) 33 Beav. 394—6.

Bree v. *Perfect* (1); *Eccles* v. *Birkett* (2); *Hanson* v. *Graham* (3); *In re Wrangham's Trust* (4); *Webster* v. *Parr* (5).

Mr. *Wickens*, for Mrs. *Lamb*:—

Leake v. *Robinson* (6) governs this case, and is an authority that no judge has ever attempted to call in question. In *Bree* v. *Perfect* there was a gift over, and that makes the case distinct from the present. *Eccles* v. *Birkett* was a case in which there was a donation for maintenance. [He also cited *Davies* v. *Fisher* (7); *Shum* v. *Hobbs* (8); *In re Bartholomew's Trusts* (9).]

Mr. *Chitty*, for the three infant Defendants, referred to *Bax* v. *Whitbread* (10); *Harrison* v. *Grimwood* (11).

Mr. *Kenyon*, in reply, cited *Goodtitle* v. *Whitby* (12); *Saunders* v. *Vautier* (13).

June 4. SIR R. MALINS, V.C.:—

In this bequest there is no gift of the interest, or direction as to its application for the benefit of the legatees, but it is directed to be accumulated, and form part of the capital.

The direction to divide is the only gift, and that gift is only to attach to the children who shall attain twenty-one.

The rule laid down by Sir *William Grant* as to such a bequest, in his celebrated judgment in the case of *Leake* v. *Robinson*, is this (14): "If there were an antecedent gift, a direction to pay upon the attainment of twenty-five certainly would not postpone the vesting; but if I give to persons of any description when they attain twenty-five, or upon their attainment of twenty-five, or, from and after their attaining twenty-five, is it not precisely the same thing as if I gave to such of those persons as should attain

(1) 1 Coll. 128.
(2) 4 De G. & Sm. 105.
(3) 6 Ves. 239.
(4) 1 Dr. & Sm. 358.
(5) 26 Beav. 236.
(6) 2 Mer. 363.
(7) 5 Beav. 201.
(8) 3 Drew. 93.
(9) 1 Mac. & G. 354.
(10) 10 Ves. 31.
(11) 12 Beav. 192.
(12) 1 Burr. 238.
(13) Cr. & P. 240.
(14) 2 Mer. 386.

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twenty-five? None but a person who can predicate of himself that he has attained twenty-five can claim anything under such gift." In *Hanson* v. *Graham* (1), the case mainly relied upon by Mr. *Kenyon*, and so frequently cited, the bequest was of £500 a-piece to the three children of the testator's daughter, *Mary Hanson*, when they should respectively attain their ages of twenty-one years, or days of marriage. And he declared that the interest of the several sums of £500, as often as the same should become payable, should be laid out at the discretion of the executors, for the benefit of his grandchildren till they should attain their respective ages of twenty-one; and Sir *William Grant*, after a most elaborate judgment, came to the conclusion that the whole of the legacies vested in the legatees, although they died before they attained twenty-one; and (2) he thus expresses himself, after disputing the opinion of the Master of the Rolls, in *May* v. *Wood* (3): "I should have determined against the Plaintiffs if it stood merely upon the first words, but then it is contended that they are entitled because interest is given, and that they come within an established rule of the Court, that though such words are used as would not have vested the legacy, yet the circumstance of giving interest is an indication of intention explanatory, and denoting that the testator meant the whole legacy to belong to the legatee. On the other side it was contended that the interest is not so given as to bring it within the general rule, but what is given is more like maintenance. It is true it has been held that has not the same effect as giving interest, upon this principle, that nothing more than maintenance can be called for—what can be shewn to be necessary for maintenance—however large the interest may be; and therefore what is not taken out of the fund for maintenance must follow the fate of the principal, whatever that may be. But by this will it is clear the whole interest is given. Can there be any doubt that in this case all the interest became, as it fell due, the absolute property of these infants, as separated altogether from the residue? All that is left to the trustees is to determine in what manner it may be best employed. It is not merely so much of the interest as shall be necessary for the maintenance, but the interest entirely, separated from the principal. It is, therefore, the

(1) 6 Ves. 239. (2) 6 Ves. 249. (3) 3 Bro. C. C. 471.

simple case of interest." After referring to another contention, he concludes:—"The legacy is accompanied with an absolute gift of the interest, which, according to the established rule, has the effect of vesting it. I am, therefore, of opinion that the Plaintiffs are entitled." It is clear that he considered the whole interest given, because he held that the legacy was vested and not contingent, as he would have held, if it had not been for the gift of the interest. Now the case of *Hanson* v. *Graham* (1) was decided by Sir *W. Grant* in 1801, at the commencement of his judicial career, and *Leake* v. *Robinson* (2) in 1817, at its conclusion; and, therefore, during the whole of his judicial life he adhered to the same rule, that a gift of a legacy, "as," or "when," or "if," the party attains twenty-one, renders the gift contingent. In this case there is no gift whatever of interest, and therefore, as this case falls so distinctly within the rule laid down by Sir *William Grant* in *Leake* v. *Robinson*, and his decision in *Hanson* v. *Graham*, where the gift would have been held contingent if it had not been for the gift of the interest for the benefit of the children during the minority, I should have had no hesitation in deciding against the representatives of children who had died under the age of twenty-one, at the conclusion of the arguments, if I had not been pressed by numerous authorities which appeared to have impugned the decision of Sir *William Grant*, in *Leake* v. *Robinson*. I have now carefully considered those authorities, and I am satisfied that the rule laid down in that celebrated case is still the rule of the Court. Mr. *Wickens*, who argued the case for Mrs. *Lamb*, against the claim of the children who died previously, correctly stated that no Judge had ever proceeded so far as to overrule *Leake* v. *Robinson*, or to decide in contravention of the rule laid down by Sir *William Grant*, and it will be found that all the authorities relied upon depend on their own particular circumstances, which distinguished the gifts decided upon in those cases, from that in *Leake* v. *Robinson*.

I will take the cases in the order in which they were cited by Mr. *Herbert Smith*, Mr. *Kenyon*, and Mr. *Bush*, who represented conflicting interests, and did not, consequently, press the construction in favour of the infant children so much. The first

(1) 6 Ves. 239. (2) 2 Mer. 363.

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case is *Pearman* v. *Pearman* (1), where there was a gift to the children of the tenant for life, as and when he, she, or they should respectively attain the age of twenty-one, but in case they died under that age, then there was a gift over; it was decided by Lord *Romilly* that the children took vested interests at their birth, on three grounds: first, that it was a gift of residue; secondly, that there was a gift over; and, thirdly, that there was a gift of maintenance in the meantime, every one of which are wanting in the present case. In *Bree* v. *Perfect* (2) there was a gift of £3000 to *Frances Bree* for life, and at her death to be divided amongst such of her children as should be living at the time of her death, as they respectively attained the age of twenty-one years; but if she should die without leaving issue, then the £3000 to be paid to another person, and that depended on the gift over on the failure of issue, which is wanting here. The Vice-Chancellor said:—"Taking the whole disposition together, and especially considering that the limitation over is upon the niece dying without leaving issue, the true construction of the will is, that the shares did vest in the children on the death of the tenant for life." In *Re Wrangham's Trust* (3), the testator's daughter had a life interest, and, after her death, the principal to her children on their attaining the age of twenty-one, but should the daughter die without leaving any issue, there was a gift over, Sir *Richard Kindersley* held the gift to be contingent. Not only, therefore, was that gift dependent on the attainment of twenty-one, but there was a gift over on the daughter dying without leaving issue, shewing that, as in *Bree* v. *Perfect* there was an intention that the gift should vest; and so far from Sir *Richard Kindersley* being in favour of vesting, he said that such a gift rendered the legacy contingent, and not vested. That, therefore, is a decision which completely supports the construction which I intend to put on this will.

In *Eccles* v. *Birkett* (4), the gift was to pay to each of "my children who shall be living at the time of my decease, as and when they shall respectively attain the age of twenty-five years, the sum of £3000; and I declare it shall be lawful for my

(1) 33 Beav. 394.
(2) 1 Coll. 128.
(3) 1 Dr. & Sm. 358.
(4) 4 De G. & Sm. 105.

trustees to apply all or any part of the income of such respective share for his or her maintenance, or otherwise for his or her benefit, till he or she shall attain the age of twenty-five years." And Lord Justice *Knight Bruce* (then Vice-Chancellor) held that the legacy was vested at the death of the testator. The report merely says "he held," the reasons for the judgment are not given; but there can be no doubt that the decision proceeded on the ground that interest was given for the benefit of the legatees; and, therefore, that although they might die under twenty-five, the legacy would be vested. In *Webster* v. *Parr* (1), the last case cited by Mr. *Herbert Smith*, the three daughters of the testator, about whose shares the question arose, all attained twenty-five. There could be no question, therefore, of remoteness, because, to take at all, they must be living at the time of his death, and all attaining twenty-five, and there was no question of contingency, but the decision wholly turned upon their dying without issue, leaving it simply on attaining twenty-five, with a gift over if they died without issue, which the Master of the Rolls held would be too remote. In addition to the other cases, Mr. *Wickens* cited and commented upon *In re Bartholomew's Trust* (2), *Davies* v. *Fisher* (3), and *Shum* v. *Hobbs* (4); and Mr. *Chitty* cited *Harrison* v. *Grimwood* (5). In *Re Bartholomew's Trust* the gift was to the mother for life, and after her death upon trust, to "stand possessed of £2000 upon trust to pay the same unto or between or amongst all and every the child and children of my said daughter, as and when they shall severally attain the respective ages of twenty-one years . . . to whom I give and bequeath the same accordingly, with benefit of survivorship to and amongst such child or children, in case of the death of any one or more of them before such share or shares of and in the said sum of £2000 shall become payable." And Lord *Cottenham* and Sir *Lancelot Shadwell* held that the legacies were vested in an only child at her birth, but they did so on the ground that the words amounted to an immediate gift, with a direction to pay at twenty-one, and therefore they did not attempt to impugn the rule laid down in the case of *Leake* v.

(1) 26 Beav. 236.
(2) 1 Mac. & G. 354.
(3) 5 Beav. 201.
(4) 3 Drew. 93.
(5) 12 Beav. 192.

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Robinson (1), but, on the contrary, they in terms upheld it. I confess I should feel myself bound by *In re Bartholomew's Trust* (2), but I cannot see the distinction which Lord *Cottenham* drew in respect of the words, "to whom I give and bequeath the same accordingly." He evidently attached extraordinary importance to those words. But it always has appeared, and still does appear to me that they were a mere redundancy, a mere description of the objects of the gift. But it is sufficient to say that he decided the case expressly on those words, as giving an immediate gift to the children, with payment directed at twenty-one, which is always a vested legacy. In *Davies* v. *Fisher* (3), the trust was during the life of *William Davies*, to pay the income to him, and after his decease in trust for his children as they severally attained the age of twenty-five years, equally to be divided, if more than one, and if but one, then the whole to such one, the income to be applied during their respective minorities, by their guardians, for their respective support, maintenance, and education. And in case no child of *William Davies* should attain twenty-five, there was a gift over. Now, there it was held that the legacy was vested, but, on the very distinct ground of the income being given during the minorities, constituting the difference between that and the present case: in this case there being "no direction for maintenance," and there Lord *Langdale* says (4): "I think that if the directions to divide had stood alone, the gift would have been too remote. In this case, as in *Leake* v. *Robinson*, it is only through the medium of the directions given to the trustees that we can ascertain who were the persons intended to take, and what benefits were intended for them; and the trust is for all the children of *W. Davies*, as they severally attain the age of twenty-five years; none were to be excluded, and none to have anything till the age of twenty-five years was attained. This would be too remote; but, secondly, expressions of this kind, of themselves importing a postponement of the vesting, may be so controlled by other expressions and circumstances, as to postpone payment or possession only, and not the vesting, and it has been held that a direction to apply the interest for the benefit of the legatee affords evidence of intention

(1) 2 Mer. 363.
(2) 1 Mac. & G. 354.
(3) 5 Beav. 201.
(4) Ibid. 209.

to vest the capital; and it has not been disputed that if the testator had directed the whole interest to be applied for the benefit of the legatees, during the whole time between the death of the tenant for life and the time of payment, and if there had been no gift over, it must have been held that the capital was vested." This is a very simple gift, and Lord *Langdale's* judgment is entirely in accordance with the rule I have referred to, but he adds: "Too much reliance must not be placed on the expression, 'the whole interest,' which has been used in some of the cases." The objection to the gift being vested was overruled, simply on the ground that interest was given, and therefore it was held vested.

Shum v. *Hobbs* (1), cited by Mr. *Wickens*, was a very peculiar case, having no immediate application to the present, but the judgment of Sir *Richard Kindersley* is favourable to holding such a gift as this contingent. In *Harrison* v. *Grimwood* (2), the gift was to pay, and apply, and divide among the children, when and as they should attain the age of twenty-six years; and there was a trust for maintenance. The Master of the Rolls said: "And though when the gift is found or implied only on the direction to pay, and is not otherwise affected or explained by the context of the will, the Court may reasonably construe the direction to be only for the persons to whom the payment is directed to be made, and who are to receive at the time indicated; yet, as the meaning is ambiguous, and as the nature of the gift is only known by implication, we must look at other parts of the will with a view to discover whether they afford any further indication or explanation of the implied gift. This case, like all others of the same class, appears to me, partly from the nature of the subject, and partly from the state of the authorities, to be very doubtful. But, observing the right given to the children to be maintained out of the interest or income given to their mother, and arising or accruing on the share eventually given to them; observing the direction in the case of minorities to place out that share and apply the interest or a competent part of the interest arising from it (though it is not necessarily all the interest which is directed to be applied, and that only during minority), and noticing also

(1) 3 Drew. 93. (2) 12 Beav. 192.

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the power given to the trustees to advance them in the world, I think that I ought to conclude that a vested interest was given to the children of the daughter." And, therefore, it all depended on the circumstance of maintenance being given. *Boraston's Case* (1), and *Goodtitle* v. *Whitby* (2), cited by Mr. *Kenyon*, were devises of land totally different from this case as to the principles involved, and do not govern it.

In this state of the authorities I am bound to decide that the fund goes to such of the children of *Wadham Locke* as were living when Mrs. *Lamb* attained twenty-one, and who have attained or shall attain twenty-one. I may add that my own view is, that it would be much more for the convenience of families, that a gift of this kind should not vest until twenty-one, although maintenance is given in the meantime; that it is much more desirable that they should vest when the child requires it, and not go to the personal representative, who in most cases is the father.

Solicitors for the Plaintiffs: Messrs. *Rickards & Walker.*
Solicitors for the Defendants: Messrs. *Johnson & Weatheralls.*

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BAKER *v.* FARMER.

Pecuniary and Residuary Legatees—Loss of Assets after Appropriation—Abatement.

A testator, by his will, dated in 1829, gave £2300 bank annuities to trustees upon trust to pay so much of his debts as his ready money should be insufficient to satisfy, and to invest the residue and pay the interest to his wife for life; and after her decease to pay seven different legacies amounting to £1075, and to pay the residue to *A. B.* absolutely. The testator died in 1832, and the estate was completely administered and wound up, and no part being required for debts, the £2300 was set apart and appropriated as trust funds, and transferred into the names of the trustees upon the trusts of the will. Both trustees died, and the administrator of the survivor got possession of the funds and misappropriated the greater part, so that only £716 was forthcoming. The widow died in 1862:—

Held, that there having been a complete appropriation of the fund awaiting

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(1) 3 Rep. 19 a. (2) 1 Burr. 238.

only the period of distribution, and there being no deficiency of assets, the pecuniary legatees must abate *pari passu* with the residuary legatee, each being entitled to the proportion they would have had if the whole amount had been forthcoming.

Varied by 2 H. 3d. 537.

WILLIAM MACROFT, by his will, dated in March, 1829, gave and bequeathed a sum of £2300 reduced bank annuities to *J. A. Bell* and *J. Osbourn*, upon trust to sell so much thereof for payment of his debts as his ready money and dividends then payable should be insufficient to satisfy, and to invest the residue and pay the interest to his wife for life, and after her decease to sell the said £2300, and stand possessed of the proceeds thereof, and of all other his personal estate and effects whatsoever and wheresoever, in trust to pay certain legacies to seven different persons (amounting in the whole to £1075), and as to all the rest and residue of the moneys and personal estate and effects not thereinbefore disposed of, in trust for *W. M. Baron*, to and for his sole use and benefit.

The testator died in February, 1832, and the said *J. A. Bell* and *J. Osbourn* completely administered and wound up the estate of the testator, and set apart the sum of £2300 stock as trust funds, according to the directions of the will, and transferred the same into the names of the said *J. A. Bell* and *J. Osbourn* upon the trusts declared thereof, and no part was, or ever had been, required for the purpose of discharging the debts of the testator.

J. A. Bell died on the 12th of November, 1856, and *J. Osbourn*, his co-executor and trustee, died intestate on the 22nd of November, 1856, leaving a son, *J. Macroft Osbourn*, who took out letters of administration to his estate and effects.

At the time of the death of *James Osbourn*, the said sum of £2300 stock was standing in the names of *J. A. Bell* and *J. Osbourn*, and the interest, or a sum equal to the interest, thereof was duly paid half-yearly by *J. Macroft Osbourn* to the widow of the testator till her death, which took place in March, 1862.

William M. Baron, the residuary legatee, died in June, 1848, and the defendants were his legal personal representatives.

On the death of the testator's widow it was discovered that *J. Macroft Osbourn* had sold out the whole of the £2300, and appropriated the proceeds to his own private use.

In consequence of this misappropriation of the moneys, *J. Ma-*

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croft Osbourn was, on the 18th of July, 1862, taken into custody and duly committed for trial, and in the following year he was sentenced to three years' penal servitude.

At the time of his apprehension he gave up to the police officer who arrested him, the key of a box, which he said "contained all with reference to the matter" for which he was apprehended.

In this box the sum of £716 in notes and gold was found, and it was admitted by all parties that this sum consisted of moneys received by *J. Macroft Osbourn* out of the proceeds of the sale of the £2300, and that this was all that remained of the said sum.

The £716 was thereupon paid into the hands of two solicitors, and was now held by them upon trust for the parties entitled under the will.

The Plaintiffs, who were the pecuniary legatees, or who represented such legatees, under the will of *James Macroft*, filed this bill, praying a declaration that the said sum of £716 and interest was applicable in the first place to the payment of the several legacies to which they were entitled under the will, in priority to any claim or right of the Defendants as the representatives of the residuary legatee, *W. M. Baron*, and that such sum might be ordered to be paid to them in proportion to the amounts to which they were respectively entitled.

The Defendants, as representing the estate of the residuary legatee, insisted that the sum of £716 and interest ought to be distributed rateably between them and the Plaintiffs, according to the respective proportions which the several legacies directed to be paid by the will, would have borne to the residue of the said sum of £2300 bank annuities.

Mr. *Glasse*, Q.C., and Mr. *Everitt*, for the Plaintiffs:—

The residuary legatee is not entitled to any share in this fund until the pecuniary legatees have been paid as far as the fund will permit. This is a rule upon which the Court always acts. The residuary legatee can take nothing but the residue after payment of the legacies, and there is nothing to alter the principle in the present case. This was acted upon in *Harley* v. *Moon* (1), where, upon a fund being insufficient for payment of both pecuniary and

(1) 1 Dr. & Sm. 623.

residuary legatees, it was held that the pecuniary legatees were not to abate, and the residuary legatee took only so much as might happen to be the residue. The same principle was acted upon in *Willmott* v. *Jenkins* (1).

Mr. *Horsey*, for one of the legatees.

Mr. *Baily*, Q.C., and Mr. *Jason Smith*, for the Defendants:—

This case differs from those in which the residuary legatee has been held to take only what remains, because here the fund was actually appropriated. The debts were all paid without having recourse to this fund, and the estate was completely wound up. There was no deficiency of assets, and the actual amount given by the testator was transferred into the names of the trustees to await the period of distribution, that is, the death of the tenant for life; and this was done thirty years before the period of distribution arrived. In *Dyose* v. *Dyose* (2), where a testator gave £3000 a-piece to his two younger sons, and the surplus to his eldest son, and a deficiency arose in the assets owing to the default of the executor, the residuary legatee was allowed to come in *pari passu* with the other legatees, and the same thing was done in *Ex parte Chadwin* (3); *Partington* v. *Carrington* (4); and *Humphreys* v. *Humphreys* (5).

Mr. *Glasse*, in reply:—

The case of *Dyose* v. *Dyose* was decided upon the particular circumstances which arose. It was clear that the testator never intended his two younger sons to have a larger legacy than his eldest son. The testator intended the residue to be a specific legacy to the eldest son.

SIR R. MALINS, V.C.:—

The main point raised by this bill is one of considerable nicety; but there have been some points argued in the case which I think admit of no doubt whatever. The will is one by which

(1) 1 Beav. 401.
(2) 1 P. Wms. 305.
(3) 3 Sw. 380.
(4) 5 Jur. (N.S.) 1093.
(5) 2 Cox, 184.

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the testator (who died thirty-eight years ago) gave a specific legacy of £2300 Reduced Bank Annuities, the income of which was to be paid to his wife for life, and after her death certain legacies were to be paid out of the produce of the stock, and what remained after payment of those legacies was to fall into the residue, and the general residue of the estate was then given to *W. M. Baron*. Now, some reliance has been placed upon the circumstance that this £2300 is made liable to the debts of the testator, but that does not make any difference in the result, because, however clearly a person may give a specific legacy, if his assets are otherwise insufficient to pay his debts, the specific legacy must contribute towards the payment of them if the general assets are not sufficient. It turns out that no part of this money was required for the payment of the debts. The result is, that there is a specific legacy as to which the widow is entitled to the life interest, and, after the legacies are paid, what remains is to go to the residuary legatee.

Upon one of the points which have been argued I should feel no doubt, namely, that if the assets of the testator should prove insufficient to pay these legacies, the pecuniary legatees would be entitled to priority over the residuary legatees to the extent of their legacies. If, therefore, the assets of the testator had been originally insufficient to produce £2300, or, being sufficient originally to produce that amount, the stock had fallen to such an extent as to render it insufficient for the payment of the legacies, then the deficiency must have fallen upon the residuary legatees, it being clear to my mind that the pecuniary legatees are entitled to priority as between them and the residuary legatees; but it turns out, as I have said, that the assets are abundantly sufficient, because the statement in the bill is, that in 1832, which is thirty years before the death of the tenant for life, there was a complete appropriation of this stock. The bill leaves no doubt whatever as to the appropriation, because the Plaintiffs' statement is, "And they duly and completely administered and wound up the estate of the testator, and set apart and appropriated the sum of £2300 3½ per Cent. Bank Annuities as trust funds, according to the directions of the testator's will, and transferred the same into the names of the said *James Abraham Bell* and *James Osbourn*, upon the trusts

declared thereof by the testator's will, and no part of the said sum of £2300 bank annuities is, or ever has been, required for the purpose of discharging the debts, funeral or testamentary expenses." Therefore, not only from the circumstance of the trustees carrying the amount of this legacy into their own names, more than thirty years ago, but because it is stated by the Plaintiffs in their own bill, I hold that this is a final appropriation of that legacy of £2300 stock.

That being so, what is the position of the parties with regard to this appropriated legacy? It is quite clear that the residuary legatees and the pecuniary legatees have a common interest in the fund, and having that common interest, what was their position? If the stock had been sold the pecuniary legatees must first have been paid in full; secondly, all that remained must go to the residuary legatees. The result is, that the fund was one which was abundantly sufficient, not only to pay the legacies, but also it is clear that this was a fund in which practically, and for all purposes, the pecuniary legatees were entitled to one-half, and the residuary legatee was entitled to the other half. In this state of things a common calamity happens to them both, by the dishonesty of the persons in whose charge the fund was. The result is, that instead of £2300 stock, there is only £716 now forthcoming. What does fairness and justice require under such circumstances? I consider that justice requires that, as they have a common interest in the fund, and as the calamity is common, so the loss should be common also; in other words, that they should bear the loss in proportion to their interest, because this priority of the legatees has no application here, there being no deficiency of assets to pay the legacy in full. I must consider both of these parties as being in the possession of the legacy through the possession of the trustees, who await the period of distribution, namely, the life estate falling in, and upon that period of distribution arriving, if it had not been for the default of the trustee, the whole fund would have been forthcoming, and there would have been enough to pay all, and the residue would have gone to the residuary legatee.

Now, as regards authority, the cases are very distinct upon the subject. I am glad to find that I am not fettered by authority. In the first place there is the decision of Lord *Cowper* in *Dyose* v.

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Dyose (1), and I think the facts of that case have been somewhat overlooked. That was a case in which the testator gave to two of his sons a legacy of £1000, and the residue to his third son. Upon general principles there can be no doubt that, under those circumstances, the residue being given to the third son, if the assets of the testator had only been sufficient to pay the legacies of £1000 each, the residuary legatee would have gone without anything at all. But that is not the case. The assets were about £20,000, and there being £20,000 forthcoming, the executor afterwards wastes the assets, and the question is, whether that wasting of the assets is to fall wholly upon the residuary legatees, or whether it is to be borne rateably by the pecuniary legatees and the residuary legatees. The judgment of Lord *Cowper* was that, under those circumstances, it was to be borne rateably, according to the interests of the several parties. Mr. *Glasse* has very much pressed upon me the case of *Willmott* v. *Jenkins* (2). Now, as I read that case, the decision is one which completely bears out the view which I take. In *Willmott* v. *Jenkins* the facts stood thus: "An executor, who was also trustee, divided the assets. He paid to the adult legatees their shares, and invested the share of an infant in his own name, but he executed no declaration of trust thereof. He afterwards applied these sums to his own use. Further assets having unexpectedly fallen in, it was held that they ought in the first place to be applied in making good the infant's legacies." On what ground was that case decided? Why on the very ground of the absence of the circumstance which exists here, namely, the effectual appropriation of the legacy. The Master of the Rolls, Lord *Langdale*, says: (3) "If an executor makes payments to a legatee in person, or to a trustee for a legatee, or makes such an appropriation as is equivalent to payment, the other persons entitled under the will are not to be called on to contribute for any loss which may afterwards happen to the fund so paid or appropriated. But if there be no payment, and no appropriation equivalent to payment, I do not see why, if anything afterwards comes to the hands of the executors, it should not be applied in discharge of the legacies of the unpaid legatees. I must take it that all these sums were carried to one

(1) 1 P. Wms. 305. (2) 1 Beav. 401. (3) 1 Beav. 404.

account, and blended together in the name of the executor; so that in effect there was no appropriation, although the executor might have intended it. The point has been well put, that in cases where an executor is also trustee, and no appropriation is made, one cannot see where executorship ceases and trusteeship begins. I think there was an intention to appropriate, but that such intention was not carried into effect. I must declare that this fund is applicable in the first place in paying the unpaid legacies; and, secondly, in satisfying such of the residuary legatees as were infants and received nothing on the former division; the remainder will then be divisible amongst all the residuary legatees equally." Now, it is clear from that judgment that the whole argument, and the whole decision, turned upon the fact of there being no appropriation; and it is clear from that that Lord *Langdale* would have considered that, if the infant's legacy had been appropriated, the loss would have fallen upon them, and not upon the general estate. It being once paid, if the legatee wastes his money it is his own fault. So if there has been an appropriation, if the appropriated funds are misapplied, the consequences of the misapplication must fall upon those in whose favour the appropriation has been made. With regard to *Ex parte Chadwin* (1), that was a case in which there had been an appropriation. In one case there had not been an appropriation, and in the other case there had been. Lord *Eldon's* view was, that such had been the course of dealing between the executor and the legatee, that the legatee had agreed to look to the executor only; and there having been an appropriation, and the executor having become bankrupt, the loss fell upon those in whose favour the appropriation had been made, and they were not allowed to come on the general estate.

From these cases I collect that wherever there has been a complete appropriation, and afterwards any misapplication, the whole of the loss must fall upon the legatee whose legacy has been misapplied. In this case there has been a complete appropriation, which took place more than thirty years before the death of the tenant for life. The appropriated fund has, in fact, been stolen to a certain extent, for, out of £2300, £716 only remains; and I am very clearly of opinion, upon principle as well as upon authority,

(1) 3 Sw. 380.

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that the consequences of the robbery, or the loss of the appropriated fund after the appropriation has been once made, must fall upon all the legatees in proportion to the legacies, because this is an appropriation as much for the benefit of the specific legatees as for the benefit of the residuary legatees. What I have to do is to apply the same rule as would have been applied if the whole were forthcoming. The fund has been diminished, not by any act of the testator, or by any accident for which he was responsible, but by a subsequent event which has occurred after the appropriation, and that must fall, in my opinion, upon the share of every one interested in the appropriated fund. Therefore the declaration will be, that the Plaintiffs, who represent the pecuniary legatees, and the Defendants, *Farmer* and *Pudney*, who represent the residuary legatees, will be entitled to the £716, or so much as remains after payment of the costs, in the same proportion in which they would have shared if, at the death of the widow, the £2300 had been forthcoming.

Solicitors for the Plaintiffs: Messrs. *Duffield & Bruty*.
Solicitors for the Defendants: Messrs. *Drew & Wilkinson*.

V.-C. M. 1867 June 4.

SMITH *v.* CHERRILL.

Voluntary Settlement—Collateral Relatives—13 *Eliz.* c. 5.

A lady being indebted to the Plaintiff at the time of marriage, settled all her real and personal property (with the exception of jewels and furniture exceeding in value the amount of her debt), upon failure of issue of the marriage, in favour of certain collateral relatives, including a niece whom she had adopted as her daughter.

The lady survived her husband, and died without issue, leaving no assets:—*Held*, that the settlement, so far as it was made in favour of collaterals, was voluntary, and must be set aside to the extent of the Plaintiff's debt.

THIS suit was instituted by the Plaintiff, *Susanna Smith*, on behalf of herself and all other the creditors, if any, of *Frances Ann Smith*, deceased, against the trustees of a settlement made upon the marriage of *Frances Ann Smith*, and against the persons beneficially interested under that settlement, seeking to set it aside, so far as

it would enable the Plaintiff to obtain payment of a debt of £350, due to the Plaintiff from *F. A. Smith.*

The bill stated that in the month of May, 1862, *F. A. Smith* borrowed from the Plaintiff a sum of £300, and by way of security for that sum, as well as a sum of £50 previously lent by the Plaintiff to the first husband of *F. A. Smith*, *F. A. Smith* gave to the Plaintiff a promissory note for £350, with interest at £5 per cent. On the 3rd of November, 1862, a settlement was executed upon the marriage of *F. A. Smith* with *Charles Dobson Smith*, whereby various sums of money, and certain real and personal property, were vested in the Defendants, *Sidney Cherrill* and *Thomas Abbott Tibbitts*, upon trust to pay the interest and annual proceeds thereof to *F. A. Smith* for her life, and after her death to stand seised and possessed of the said property in trust for the children of the marriage, if there should be any, and if not, then in trust for the benefit of the several persons following, namely, *Matilda Cherrill* (the mother of *F. A. Smith*), *Fanny English* (the niece and adopted daughter of *F. A. Smith*), *Matilda Weltje* (the sister of *F. A. Smith*), and *Matilda English* (the sister of *Fanny English*), with provisions in favour of their respective husbands and issue (if they should have any) in the shares and proportions therein mentioned, and in the same way as if they had been the children of the settlor, with an ultimate trust in favour of the next of kin of the said *F. A. Smith;* and the settlement contained a power enabling *F. A. Smith* to appoint an annuity of £200 after her death to the said *Charles Dobson Smith*, her intended husband. There was no child of the marriage.

F. A. Smith died on the 2nd of October, 1865, having by her will executed the power of appointment in favour of her husband given to her by the settlement, and the Defendant *Sydney Cherrill* was her legal personal representative.

F. A. Smith paid to the Plaintiff interest on her said debt up to the month of November, 1864; and since her death the Plaintiff had applied to *Sydney Cherrill* for payment of the debt, and the interest due thereon, but he had refused payment, and alleged, as the fact was, that *F. A. Smith* had left no assets applicable to the payment thereof.

The bill prayed that it might be declared that the settlement of

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the 3rd of November, 1862, so far as the trusts and provisions thereof were in favour or for the benefit of the Defendants, *Matilda Cherrill*, *Fanny English*, *Matilda Weltje*, and *Matilda English*, and their respective husbands and issue, and the next of kin of the said *F. A. Smith*, was fraudulent and void as against the Plaintiff and the other creditors (if any) of the said *F. A. Smith*, and that the same, to the extent of such trusts and provisions, might be set aside accordingly; that an account might be taken of what was due to the Plaintiff and the other creditors of *F. A. Smith*, and that the amount so found due, with the costs of the suit, might be raised and paid out of the property comprised in, or subject to, the trusts of the settlement.

It was stated by the answer of the Defendants that the jewellery, plate, and furniture belonging to *F. A. Smith* upon her marriage, which was of the value of more than £600, was not comprised in the settlement, and that the same went to *Charles D. Smith* in his marital right; that all the remainder of her property was comprised in the settlement; and further, that there was no other claim against the estate of *F. A. Smith*, except that of the Plaintiff.

Mr. *Baily*, Q.C., and Mr. *Chapman Barber*, for the Plaintiff:—

We do not seek to set aside this settlement, so far as it is made in favour of those who are objects of a valuable consideration, but only as regards the collateral relatives who are mere volunteers, in favour of whom no consideration passes.

It was decided in *Johnson* v. *Legard* (1) and *Cotterell* v. *Homer* (2) that where a settlement was made upon the usual trusts for the husband and wife, and issue, with ulterior limitations in favour of collateral relatives, the limitations to the collaterals were voluntary.

There have been cases in which a settlement has been upheld where the limitations were in favour of children by a former marriage, as in *Newstead* v. *Searles* (3); or where there was a provision for illegitimate children, as in *Dickenson* v. *Wright* (4), and *Heap* v. *Tonge* (5); but a settlement in favour of collateral relatives, such as we find in this deed, has never been upheld. This debt

(1) 3 Madd. 283.
(2) 13 Sim. 506.
(3) 1 Atk. 265.
(4) 5 H. & N. 401.
(5) 9 Hare, 90.

existed at the time of the settlement, and if it is seen that the rights of such a creditor are defeated or delayed, then the settlement, being voluntary, cannot be supported as regards such volunteers. This was decided in *Spirett* v. *Willows* (1). In this case it is proved that the estate of the settlor was not sufficient, after her death, to meet the claims existing at the time of the voluntary settlement, and this, according to the case of *Skarf* v. *Soulby* (2), is sufficient to invalidate it.

Mr. *Cotton*, Q.C., and Mr. *Simmonds*, for the trustees of the settlement:—

In this case the limitations in favour of the collateral relatives were made the subject of an express bargain, and, consequently, they are not volunteers, and the limitations in the settlement are not defeasible. There was a good consideration to support the limitations in favour of collaterals. It is proved to have been part of the bargain. The cases are very numerous upon this subject. In *Dickenson* v. *Wright* (3), when the case came on upon appeal to the Exchequer Chamber (*Clarke* v. *Wright* (4)) one of the reasons given for the settlement being good in favour of an illegitimate child was, because it was presumed that the deed was made by agreement between the parties as part of the marriage bargain that the estate should be so settled.

The cases of *Johnson* v. *Legard* (5), and *Cotterell* v. *Homer* (6), were decided on the statute of 27 Eliz. c. 4; but the Plaintiff seeks to bring the impeached part of this settlement under the statute 13 Eliz. c. 5, which avoids conveyances of lands and chattels made with intent to defeat creditors, where they are not founded on a good consideration, or made *bonâ fide*. Now, assuming that the impeached portion of this settlement is voluntary, still it is not bad under the statute 13 Eliz. c. 5, for though where a man is indebted and makes a voluntary settlement the law will imply an intention to defeat creditors, yet the existence of the intention is not so far a necessary inference but that it may be negatived. It is impossible to suppose that the limitations in this settlement

(1) 11 Jur. (N. S.) 70.
(2) 1 Mac. & G. 364.
(3) 5 H. & N. 401.
(4) 6 H. & N. 849.
(5) 3 Madd. 283.
(6) 13 Sim. 505.

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which are impeached were inserted with any intention of defeating creditors. It may also be said in favour of a settlement by a wife that, simultaneously with the settlement coming into force, she gives the creditors a new debtor, though she does in fact take her own property out of the reach of process. Moreover, *F. A. Smith* had at the time of her marriage, and left unsettled personal property more than sufficient to pay this debt. It is not suggested that she owed any other debt. It is clear that the limitations, if voluntary, are not void as against the creditors.

All the limitations in this settlement are grounded on, and supported by, the contract upon the marriage, and even if that be not so, still none of the limitations can be impeached under 13 Eliz. c. 5.

In *Thompson* v. *Webster* (1), the settlement was made on condition that the husband paid an existing debt of £300, and he omitted to pay it; still the settlement was upheld, because it was not made "with intent to defraud his creditors." The principle is, that a voluntary settlement is not void unless made with intent to defraud. This was a *bonâ fide* settlement, made in consideration of the marriage, as well as for the purpose of providing for the relatives of the wife, one of whom was her adopted child, and towards whom she stood *in loco parentis: Pulvertoft* v. *Pulvertoft* (2). If the settlement had not been executed, all the wife's property would have gone to the husband for life, and the consideration was the benefit for the collaterals.

The Plaintiff, moreover, had notice of the settlement. She knew of its being executed, but she was content to receive her interest, and has lain by for four years without trying to upset it. If she had asked for repayment at once, she could have got the money from *F. A. Smith*, and it is too late, now that she is dead, to raise this contest.

Mr. *Humphreys*, for the persons entitled under the settlement.

SIR R. MALINS, V.C.:—

Had I felt any doubt on this important question, I should have heard a reply, but I do not. I regret that in so simple a case, where common honesty requires that this debt should be paid,

(1) 4 Drew. 628. (2) 18 Ves. 84.

with an estate of £600 a year, it should have been resisted. The question, however, is, whether the estate is liable. I have always understood, and still understand, the law as it was settled by the case of *Johnson* v. *Legard* (1), and by the same case as decided by Lord *Eldon* (2), and by many other cases, to be this: that when a marriage settlement goes beyond the immediate objects of the marriage, and (as in this case) there are provisions for collateral relatives from whom no valuable consideration moves, then *quoad* those objects, the settlement has nothing to do with the marriage, but is to be considered as a settlement purely for the purpose of providing for those relatives. If, therefore, this settlement had been executed, only containing a provision for the collateral relatives of *Francis Anne Smith*, that would have been strictly voluntary, and being without consideration, absolutely void as against creditors whom it defeated and delayed. Much has been said about the intention, but it is unnecessary to prove that there was an intention of delaying or defeating creditors, if it is seen that the effect has been to do so. You are then bound to attribute such an intention to the persons who executed the deed. In this case, this lady, owing money, intended, no doubt, to pay it, and why her husband has not done so, is a matter I cannot enter into. The husband cannot now be called upon to pay the debt, because on the wife's death the property under the settlement which would have gone to the heir or devisee of the wife, but for the settlement, has now passed into the hands of the trustees; and the question is, whether, in their hands, it is not liable to pay her debts? in other words, what is the effect of the settlement? It is admitted that the only property of this lady not put into settlement was household furniture and jewels, and some other matters, which became by the marriage the property of the husband. She completely deprived herself of the means of paying the debt, and the question is, whether the property which she voluntarily settled did not still remain liable to it. The doctrine of the Court, which is well established, is this: if a person makes a voluntary settlement, and is, at the time, indebted to the extent of insolvency, or if the effect of the settlement is to deprive him of the means of paying, that settlement is void as against creditors. This lady

(1) 6 M. & S. 60. (2) T. & R. 281.

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was not insolvent at the time of the marriage, but she put everything into the settlement, and the effect, therefore, was to render her insolvent, and to deprive her of the means of payment. This settlement, so far as the ultimate limitations go, is not for value, but purely voluntary; and what does justice require but that those who are bound to pay should not be sheltered? Nor can any other construction be put upon it, but that the debt should be paid, and that volunteers should not take property which ought to have paid the debt, without discharging the obligation. It has been said, that the rules laid down by Lord *Westbury* in *Spirett* v. *Willows* (1) are opposed to those enunciated in *Thompson* v. *Webster* (2), which proceeded on the ground that there was no evidence that the settlor was insolvent at the time when the settlement was made by him, but it appeared to Sir *Richard Kindersley* that the result had been to deprive him of the means of paying the debt, and that would make it void as against creditors. With regard to the authority mainly relied upon in the Exchequer and Exchequer Chamber, of *Dickenson* v. *Wright* (3), and *Clarke* v. *Wright* (4), those cases proceeded upon no principle which touches this case, because they followed the decision of Lord *Hardwicke* in *Newstead* v. *Searles* (5), where he held that the object being to make a settlement on the issue of the children of a former marriage to take with those of a future marriage, that settlement was not void as against creditors or a purchaser, under the statute of the 13 Eliz. All that was decided in *Clarke* v. *Wright* was, that inasmuch as the parties had agreed to treat an illegitimate child of the wife as legitimate, and the husband being bound to support an illegitimate child of the wife, there was an obligation on the husband that the illegitimate child should be treated in the same manner as the legitimate. That case has no application to the present, where it is for collateral relatives only. One argument I should have been happy to yield to, namely, the provision for *Fanny English*, called the adopted child of Mrs. *White*, and intended to take the same provision as her issue would have been entitled to. The expression of an inten-

(1) 11 Jur. (N. S.) 70.
(2) 4 Drew. 628.
(3) 5 H. & N. 401.
(4) 6 Ibid. 849.
(5) 1 Atk. 265.

tion to put them all on a footing of equality is no doubt a very strong expression, but the word "adopted" is very indefinite. As there were no children of the marriage, I can only treat her in the same way as the collateral relatives, and there being no obligation to provide for them, I must take the whole limitations together, and consider them voluntary. There being no other property that can be reached, there must be a declaration that so far as the debt of £350 is concerned, the settlement is fraudulent and void, and must be set aside; and the debt being a charge upon the property, it must be raised, if necessary, with interest.

Solicitor for the Plaintiff: Mr. *Towne*.
Solicitor for the Defendants: Mr. *T. A. Tibbitts*.

LAYARD *v.* MAUD.

Mortgage—Deposit of Deeds—Priority—Negligence.

A., having contracted to purchase an advowson, borrowed from *B.* £2500, and covenanted with him to pay for and convey the advowson to him within six months. *A.* completed the purchase of the advowson, but never conveyed it under the covenant. He subsequently borrowed £1000 from *C.*, and covenanted to convey to him the advowson, and deposited with him the title deeds, but there was no conveyance of the legal estate:—

Held, that the first mortgage must be postponed to the second.

THIS was a foreclosure suit by the transferees of a legal mortgage of property in *Warwickshire*, and of an equitable mortgage of the advowson of *Haseley*.

There was no dispute as to the legal mortgage, but the Defendants, the Messrs. *Halford*, claimed priority to the Plaintiffs as to the advowson.

In November, 1851, *William Edwards Wood*, by deed, conveyed to *Benjamin Austen* in fee a mansion-house and grounds, called *Stankhill Park*, by way of mortgage to secure the repayment of £5800 and interest.

By indenture, dated the 23rd of July, 1858, made between *W. E. Wood* of the one part, and *B. Austen* of the other part,

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reciting the aforesaid mortgage, and that *W. E. Wood* had contracted with the devisees in trust of Sir *Edmund Antrobus* for the purchase of the advowson of *Haseley* for £2800, but that the same had not been conveyed to him, and reciting that *W. E. Wood* had applied to *B. Austen* to lend him £2500, which he had agreed to do on having the repayment secured with interest on the *Stankhill* estate, and also upon the advowson; it was witnessed that in consideration of the sum of £2500 paid to *W. E. Wood* by *B. Austen*, *W. E. Wood* did subject and charge the *Stankhill* estate with the £2500 and interest, and declared that the same should not be redeemed until payment should be made to *B. Austen*, his executors, administrators, or assigns, as well of the £2500 and interest as the sum of £5800 and interest; and *W. E. Wood* covenanted with *B. Austen*, his executors, administrators, or assigns, that he, *W. E. Wood*, or his heirs, should, within six calendar months from the date of the indenture, pay to the vendors of the said advowson of *Haseley* the purchase-money for the same, and all other money payable to them under the contract; and also, within six calendar months, grant and convey the said advowson, with the appurtenances, to *B. Austen*, his heirs and assigns, or as he or they should direct, subject to redemption on payment by *W. E. Wood* to *B. Austen*, his executors, administrators, or assigns, of the £2500 and interest intended to be thereby secured. *Benjamin Austen* died on the 20th of August, 1861, having by his will devised all his property, including estates vested in him on mortgage, to *Sarah*, his wife, subject to the equities of redemption, and also appointed her sole executrix. *Sarah Austen* proved the will, and by an indenture, dated the 4th of August, 1863, transferred the said mortgages and the securities for the same to the Plaintiffs.

In June, 1860, *W. E. Wood* paid the purchase-money for the advowson of *Haseley*, and at the same time the advowson was conveyed to him in fee, and the deeds relating thereto were delivered to him(1).

By an indenture of mortgage, dated the 16th of October, 1860, made between *W. E. Wood* and the Defendants, *Charles Halford* and *Thomas Halford*, *W. E. Wood*, in consideration of £1000, covenanted with the Defendants that the advowson of *Haseley* should be

(1) See Edwards v. Wood, Marquis Bute's case, 4 Jur. N. S. 827; 6 W. R. 8; 3 De G. J. 132; 5 Jur. N. S. 181. 577; 4 Jur. N. S. 1187. 1192.

a security to them for the sum so advanced to him; and it was witnessed that *W. E. Wood* had deposited with the Defendants his title deeds to the advowson, and he also covenanted that he would, when required, execute a legal mortgage to them, subject to redemption, on payment of the £1000 and interest, and the indenture contained a power of sale.

On the advance of the £1000 by the Defendants to *W. E. Wood*, the title deeds of the advowson were, with the last-mentioned indenture, delivered to them.

It was stated, and believed to be true, that the Defendants, *Charles* and *Thomas Halford*, at the time of the advance of the £1000, had no notice of there being any charge affecting the advowson.

In December, 1863, *W. E. Wood* was adjudicated a bankrupt. In May, 1864, Messrs. *Halford* having advertised the advowson for sale under their power, the Plaintiffs gave notice of *Benjamin Austen's* charge, and the bill was filed in August, 1865, and the cause now came on upon motion for a decree. Subsequently to the filing of the bill, the Defendants became, for the first time, aware of a letter written to Mr. *Wood* on the 8th of May, 1860, and signed by Messrs. *Austen* and *De Gex*, solicitors, in which firm Mr. *Benjamin Austen* was a partner, containing the following passage: "You are of course aware that you are under a covenant to Mr. *Austen* to include the advowson in his mortgage. He has no wish to do anything which may appear uncalled for, but in waiving this he thinks some little consideration should be made as to payment to Mr. *Burton*."

Mr. *Schomberg*, Q.C., and Mr. *Shee*, appeared for the Plaintiffs:—

The ordinary rule is, that where parties have equal equitable interests, they rank according to their priorities, supposing there is no fraud, or no such gross negligence as is considered in this Court tantamount to fraud. In this case Mr. *Austen* got all that he could get; Mr. *Wood* had not, in 1858, obtained, nor, indeed, until June, 1860, could he obtain, possession of the deeds relating to the advowsons, and whatever default there was in Mr. *Austen*, in not obtaining possession of the deeds, arose from

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the act or omission of the mortgagor. There has been no gross negligence in Mr. *Austen*, or those claiming under him; he was, and they were, only passive, and the cases shew that where the first mortgagee has been inactive, or has lent, or not improperly parted with, the deeds, though highly imprudent, he has not been postponed. The uniform tenor of the authorities indicate that there must be either fraud, or what this Court considers tantamount to fraud, and no such imputation applies to Mr. *Austen* or his transferees: *Peter* v. *Russel* (1); *Plumb* v. *Fluitt* (2). In *Evans* v. *Bicknell* (3), it was held that the proposition laid down by Justice *Buller* in *Goodtitle* v. *Morgan* (4), "that a second mortgagee having the title deeds must be preferred," was, upon the then late decisions, incorrect: *Beckett* v. *Cordley* (5). The only cases in this Court, in which, where the equities are equal, a subsequent mortgagee has priority, is where he has got an actual conveyance of the legal estate without notice, or the first mortgagee has been guilty of what is deemed fraud: *Tourle* v. *Rand* (6). In *Harper* v. *Faulder* (7), the principle laid down in *Peter* v. *Russel* (8), and the other cases of that class, is not impugned, namely, that the mere parting with the deeds does not destroy the priority of a first mortgagee. It was there held that an annuitant was not postponed to a second incumbrancer by reason that the deeds were retained: *Colyer* v. *Finch* (9); *Tylee* v. *Webb* (10); *Allen* v. *Knight* (11); *Roberts* v. *Croft* (12); *Manningford* v. *Toleman* (13); *Whitbread* v. *Jordan* (14); *Stackhouse* v. *Countess of Jersey* (15); *Frazer* v. *Jones* (16); *Phillips* v. *Phillips* (17); *Martinez* v. *Cooper* (18). The rule "*qui prior est in tempore, potior est in jure*," applies to every case where the mortgages or charges are equitable, and there is an absence of fraud, or gross negligence tantamount to fraud.

(1) 1 Eq. Ca. Ab. 321-2.
(2) 2 Anstr. 432.
(3) 6 Ves. 174.
(4) 1 T. R. 755.
(5) 1 Bro. C. C. 353.
(6) 2 Ibid. 650.
(7) 4 Madd. 129.
(8) 1 Eq. Ca. Ab. 321.
(9) 5 H. L. C. 905.
(10) 6 Beav. 552.
(11) 5 Hare, 272.
(12) 2 De G. & J. 1.
(13) 1 Coll. 670.
(14) 1 Y. & C. Ex. 303.
(15) 1 J. & H. 721.
(16) 5 Hare, 475.
(17) 3 Giff. 200.
(18) 2 Russ. 198.

Mr. *Glasse*, Q.C., and Mr. *Archibald Smith*, for the Messrs. *Halford*:—

Mr. *Austen* relied, and intended to rely, upon the equity that he had; and never having enforced the covenant for conveyance of the estate, or got possession of the deeds, he must take the consequences: *Rice* v. *Rice* (1); *Hewitt* v. *Loosemore* (2); *Dowle* v. *Saunders* (3). *Colyer* v. *Finch* (4) settled the law: *Perry-Herrick* v. *Attwood* (5); *Fonblanque's* Treatise on Equity (6).

There are two points, priority and waiver. As to the latter it is clear that the letter of the 8th of May gave up the right to insist on the charge; it assumed that the mortgagee had given it up, otherwise the words, "but in waiving this" had no meaning. If that is so, all question about priority is at an end. Then, as to the mortgage itself, what was it but a charge upon something which Mr. *Wood* had not got possession of, but merely a right to have conveyed to him? Whereas the Messrs. *Halford* got a mortgage upon an estate which the mortgagor had in possession, accompanied with a deposit of deeds, and without notice of any prior incumbrance. It is impossible to conceive anything which can give a better title. Here Messrs. *Halford* were innocent parties without any notice, and the prior mortgagee neglected to do what he might have done, and Mr. *Austen* and his transferees never gave any notice to the vendors of the advowson, of their deed of 1858: *Waldron* v. *Sloper* (7); *Foster* v. *Blackstone* (8).

Mr. *Schomberg*, in reply:—

With respect to the waiver by the letter, it is not clear what it means, the expression is merely "he has no wish to do anything which may appear uncalled for."

Rice v. *Rice* was a case where the vendor, by the most culpable negligence, enabled the purchaser to deal with the estate as if he was the absolute owner; and therefore it was held, and justly held, that the vendor, having actually permitted the executed

(1) 2 Drew. 73.
(2) 9 Hare, 449.
(3) 2 H. & M. 242. 10 Jur NS 901
(4) 5 H. L. C. 905. 3 Jur NS 525
(5) 2 De G. & J. 21. 4 Jur NS 101
(6) 5th Ed. vol. i. p. 166-7.
(7) 1 Drew. 193.
(8) 1 My. & K. 297—306.

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conveyance to be in the purchaser's possession before payment of the purchase-money, his lien for the purchase-money unpaid must give way to that of the innocent mortgagee. That case, therefore, is not analogous to the present. If the law on the subject were *res nova*, it might be not unreasonable to hold that the absence of the possession of the title deeds should postpone the first equitable mortgagee; but *Peter* v. *Russel* (1), and that line of cases, lays down the rule of the Court most distinctly, that, unless there is something more than the mere parting with the deeds, the priorities are the guide. All the recent cases go on the same principle, unless there are circumstances of fraud or gross negligence. Were it otherwise, a third or fourth mortgagee, without making any inquiry, or upon getting some specious answer, might indirectly in some manner get possession of the deeds, and thus squeeze out the prior incumbrancers, which would be most unjust. No such rule ever has been recognised. *Evans* v. *Bicknell* (2) distinctly repudiates the idea of any such abstract proposition, as that the mere possession of title deeds gives priority over another and first mortgagee in favour of a second mortgagee.

[*Wilmot* v. *Pike* (3) was also referred to.]

SIR R. MALINS, V.C.:—

In this case there are two questions; first, is there any mortgage at all? No doubt, originally, the indenture of July, 1858, constituted a valid equitable charge as between Mr. *Austen* and Mr. *Wood;* but it is contended that the letter of the 8th of May, 1860, amounted to a waiver of that security; and if that be so, then, at the time of the execution of the deed in favour of Messrs. *Halford*—that is, in October, 1860,—of course there was no valid mortgage to Mr. *Austen*. Mr. *Wood*, having taken a conveyance of the advowson, was then in a position to give to the Messrs. *Halford* a valid mortgage, whether that letter did or did not amount to an absolute waiver of Mr. *Austen's* right. Mr. *Wood* has put the interpretation upon it that it was, and I think he was warranted in so doing; and, therefore, considering that the property was not in mortgage, he went to Messrs. *Halford*.

(1) 1 Eq. Ca. Ab. 321. (2) 6 Ves. 174.
(3) 5 Hare, 14.

But, in the view I take of this case, it is not necessary to go into the consideration of that minor question, although, if it were, I should come to the conclusion that it was the deliberate intention of Mr. *Austen* to abandon his security on the advowson. It is obvious that when the mortgage was made to him it was of no practical value, until Mr. *Wood* had got a conveyance of the advowson and paid the purchase-money, which he had then no power to do; and there being that difficulty, and Mr. *Austen*, knowing that circumstance when the letter of the 8th of May was written, attached little importance to that mortgage, and considered, perhaps, that it might facilitate *Wood's* arrangements to have it out of the way; and I think that he deliberately intended this, and advisedly used the expression "but in waiving this," meaning that he did "waive" and intend to abandon his claim; and it is likely, if he were now alive, it never would have been set up; but the Plaintiffs, as trustees, filed this bill, having probably, as such, no option but to do so, and perform their duty by bringing the matter before the Court. I do not, however, desire to decide the question on that point, but upon what is the rule of this Court upon the other and more important question—a question of the greatest public moment as affecting the mode of dealing with property—arising, in this case, upon this simple state of facts: Mr. *Wood*, having nothing but an equitable title at the time, gave an equitable charge in favour of Mr. *Austen*. This was in July, 1858. The property having been, in the meantime, conveyed to him, he, in October, 1860, went to Messrs. *Halford*, saying that he was entitled to the property, and gave them all the title deeds there and then, being in a situation to make them a perfect title. It was argued by Mr. *Schomberg* that Mr. *Austen*, having an equitable claim, and no imputation of fraud attaching to him, there was no possible mode of ousting that charge except by a conveyance of the legal estate. If that were so, see what a monstrous result would follow: If a man borrow £100 without executing a legal mortgage, the lender, in order to make his security effectual, is bound to see who is the "possessor," and who has the evidences of title. Common sense and honesty, and the necessities of mankind require that if a man is in possession of land, and has all the evidences of ownership, he must be considered as the owner, and in

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a situation to deal with the property in the mode most advantageous to himself and those who deal with him; and that is the rule of this Court with respect to a simple deposit of deeds with or without any writing. Here there is a writing in favour of Messrs. *Halford*, but they did not take a legal conveyance; and I am at a loss to see why, by that omission, they are to be prejudiced. Mr. *Schomberg* admitted that, if there had been such legal conveyance, the bill could not have been sustained against them, except for redemption. The question is, then, were Messrs. *Halford* bound, in order to make their security perfect, to take such conveyance? I think not, because, on principle, if a man is in possession of property, with evidences of title, every one is at liberty to treat him as the owner; and the safety of persons contracting with him requires that such persons should be considered as thereby acquiring a good title as against the whole world. That is not only what the law is, but what, I think, it ought to be; and I am happy to find that the numerous cases cited support that view.

The case of *Rice* v. *Rice* (1) was a strange and peculiar one: The vendor filed the bill to establish a lien for unpaid purchase-money, as against an equitable mortgagee of the purchaser, having, as between him and the purchaser, a lien on the estate. The vendor in that case, therefore by signing the receipt for the purchase-money without receiving it, put it into the power of the purchaser to commit a fraud; and the very just and reasonable decision of Sir *Richard Kindersley* was, that the man who had put the purchaser in such a position and enabled him to deal with the property, if a loss occurred should bear it, and not the person who had lent the money, the vendor having misconducted himself by executing the deed and receipt for the purchase-money, and leaving it in the purchaser's possession. Mr. *Austen* was well known as a man not likely to be guilty of negligence. Mr. *Wood* was his client, and he had considerable confidence in him, and therefore, probably for that reason, did not attach much importance to his memorandum of charge; and he omitted to give notice to the devisees of Sir *Edmund Antrobus*, the vendors of the advowson, on the completion of the purchase, that he had a claim,

(1) 2 Drew. 73.

and to ask that the title deeds should be handed over to him; if he had done so, no doubt he would have got them, and the mortgage to Messrs. *Halford* would not have been effected. If Mr. *Austen* had a claim, on whom ought the loss now to fall? Messrs. *Halford* found Mr. *Wood* in possession of the property and the deeds, and it was, in fact, admitted that they had no knowledge of Mr. *Austen's* charge. How could they find out? were they to inquire of all mankind, and advertise in the newspapers? for the argument must go to that extent. If, on the one side, a person is not guilty of negligence, and on the other side there is a man of ordinary understanding, who has omitted to do something which the circumstances would have entitled him to do, and which he ought to have done, but the omission of which has caused the mischief complained of, surely the latter must suffer. Mr. *Schomberg* considered *Rice* v. *Rice* (1) not applicable, contending that Mr. *Austen* had not been guilty of any fraud, or anything tantamount to it, and the Defendant's security was only a covenant when they might have had a legal conveyance, and their negligence in not taking such conveyance produced the present litigation; and that negligence was more imputable to them than to Mr. *Austen*. In *Rice* v. *Rice*, though the purchaser took subject to the lien, yet there being no notice to the mortgagee that the purchase-money was unpaid, the lien was held to be absolutely discharged, and therefore the vendor was defeated. There is, in the present case, no application for the maxim, "*qui prior est in tempore, potior est in jure.*" Assuming that Mr. *Austen* and Messrs. *Halford* had an equal title, one having a charge with deeds, the other without—although he might have had them, but failed from his own negligence—both being equal in other respects, the possession of the deeds turns the balance. In *Roberts* v. *Croft* (2) the whole case proceeded on the fact of possession of the deeds by the bankers, which gave them priority. *Waldron* v. *Sloper* (3) went upon the same principle, namely, that giving up the possession of the title deeds gives priority. With respect to *Stackhouse* v. *Countess of Jersey* (4), I thought, for some time, that that case was favourable to the Plaintiffs; but, on looking into it, it clearly appears that Vice-

(1) 2 Drew. 73.
(2) 2 De G. & J. 1.
(3) 1 Drew. 193.
(4) 1 J. & H. 721.

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Chancellor *Wood* did not intend to infringe upon the general rule—that where the equitable rights are equal, possession of the deeds will turn the balance; for he decided on the ground that the party had not been guilty of negligence, shewing clearly that if he had, that would have given priority to the other. That case, therefore, does not infringe upon the general rule. With respect to that long line of authorities, beginning with *Peter* v. *Russel* (1), where it was laid down that the mere parting with the title deeds does not postpone a legal mortgagee; they all proceeded on the ground that there was a legal mortgage. Mr. *Schomberg* considered that in the case of *Harper* v. *Faulder* (2) there was not a legal mortgage, and it was there held that parting with the title deeds did not destroy the priority of the mortgagee; but I have great doubt whether, in the present day, those old cases would be supported. My impression is, that if a first mortgagee, having possession of the deeds, thinks fit to give them up, and the mortgagor borrows money of another person, principles of honesty require that the party giving up possession of the deeds should suffer, the other having got the security. I have not a shadow of doubt that where there is merely an equitable mortgage, unaccompanied by the legal estate, in every case where the equitable mortgagee either omits to get, or, having got, gives up possession of the deeds, he must always be postponed. In this case I must come to the conclusion that there is that degree of negligence in Mr. *Austen* which will postpone his claim as first mortgagee to that of Messrs. *Halford*. I decide this case on the general principle that one equitable mortgagee, without possession of the deeds, must be postponed to another who has that possession. There must be the usual foreclosure decree as to the *Stankhill* property, and a declaration that the Defendants, the *Halfords*, have priority to the Plaintiffs as to the advowson, and the Plaintiffs to be at liberty to redeem the *Halfords*.

Solicitors for the Plaintiffs: Messrs. *Austen, De Gex, & Harding*.
Solicitors for the Defendants: Messrs. *Church & Sons*; Mr. *Doyle*.

(1) 1 Eq. Ca. Ab. 321. (2) 4 Madd. 129.

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V.-C. M.
1867
May 8, 9.

Locke King's Act (17 & 18 *Vict. c.* 113)—*Scotch Heritable Bond—Direction for Payment of Debts—Exoneration of Mortgaged Estate — Election — Maintenance, additional or substitutional.*

A domiciled Englishman executed a trust disposition and settlement, in the Scotch form, of an estate in *Scotland*. He then made an English will, declaring that it should not affect the previous settlement of his Scotch estate, and charged his residuary real and personal estate with payment of his debts. He subsequently charged the Scotch estate with £14,000, by means of a Scotch heritable bond:—

Held, that the residuary estate was liable to payment of the £14,000 in exoneration of the Scotch estate.

After the date of his will the testator purchased other freehold property in *Scotland*, which passed by intestacy to his heir:—

Held, that the heir was not bound to elect, but had the same right to that property which he would have had if there had been no will.

The before-mentioned trust disposition and settlement provided a fund for the maintenance, education, and advancement of the settlor's children; and his will gave power to the trustees to make advances to the children during minority for maintenance and education:—

Held, that the provisions in the will were to be considered as additional to, and not substitutional for, the provisions for the like purpose in the settlement.

6 Eq. 2.
13 Eq. 228.

affd 4 H.L. 506

ON the 26th of February, 1859, *Wellwood Maxwell*, and *Elizabeth* his wife, executed at *Liverpool*, in the Scotch form, a trust disposition and settlement of his *Glenlee* estate in *Scotland*, by which, with the view of settling his heritable property in *Scotland* in the event of his death, *W. Maxwell* conveyed to trustees all his lands and barony of *Glenlee* to be holden upon the trusts therein mentioned, and he assigned the rents of the said estate, first, in the event of his pre-deceasing his wife, upon trust, so long as she remained unmarried a second time, or until his child or children entitled to the fee of the estate, as thereinafter provided, should attain the age of twenty-one years, or marry, to give her possession, for her own use and enjoyment, of the mansion-house at *Glenlee Park*, with the land lying round and adjacent thereto, and extending to eighty acres, rent free, and to pay over to her the rents, profits, and duties of his said estate for the purpose

See 30-31 Vict. c. 69. as to wills of persons dying after 31 Dec 1867.

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of keeping up the same, and for the maintenance, education, and advancement of his child or children; secondly, if he should have only one child who should survive him and attain twenty-one, he directed his trustees to convey to him his lands at *Glenlee*, subject to the bequest in favour of his wife, and if he should have two sons, then he directed his trustees to convey the greater portion of such estate to his eldest son, and the remainder to his second son, upon their attaining twenty-one.

On the 26th of May, 1862, *Wellwood Maxwell* made his will in the English form, and after reciting that he had executed a trust disposition and settlement of his *Glenlee* estate, he declared that the devises, bequests, and provisions of his will should be construed and take effect so as not in any manner to affect his *Glenlee* estate or the trust disposition and settlement thereof, or to put to his, her, or their election any person or persons who might claim both under such trust disposition and settlement, and under his will. The testator then made certain specific devises and bequests, and he gave the residue of his real and personal estate to his trustees to sell and convert the same into money, and to pay and discharge thereout all his just debts, funeral and testamentary expenses, and the legacies bequeathed by his will, and to invest the residue, and stand possessed of the same upon trust for the benefit of his widow and children in manner therein mentioned, and the will contained a power to the trustees to make advances to the children during their minority, for their maintenance and education, out of the shares to which they would be entitled.

On the 2nd of October, 1862, *Wellwood Maxwell* executed at *Glenlee* a heritable bond and disposition in the Scotch form, whereby he charged his estate at *Glenlee* with the sum of £14,143 0s. 8*d*. In the year 1864, *Wellwood Maxwell* purchased a piece of land, with two messuages thereon, in *New Galloway*, in *Scotland*, of the value of about £1000, but having made no disposition as to that estate, it passed to the Plaintiff, his eldest son, by intestacy.

Wellwood Maxwell died on the 12th of July, 1866, a domiciled Englishman, and his will was proved on the 6th of November, 1866. Besides the property already mentioned, he was entitled to an estate in *Canada*, and also to personal estate in *England* and

elsewhere, of the aggregate value of £100,000, or thereabouts. He left six children, three sons and three daughters, all infants, and the Plaintiff, *George Maxwell*, was the eldest son.

The bill prayed that it might be declared that the debt of £14,143 0*s.* 8*d.*, and interest, was payable out of the residuary real and personal estate of *W. Maxwell* in exoneration of the estate at *Glenlee*, on which it was charged by the bond and disposition in security; that the Plaintiff, as heir of *W. Maxwell*, was entitled to the piece of land and messuages at *New Galloway*, and that he was not bound to collate his estate and interest in those premises; and that the provisions in the will of *W. Maxwell* for maintenance and education of his children were to be considered as in addition to, and not in substitution for, the provisions for the like purpose contained in the last disposition of the 26th of February, 1859.

Mr. *Anderson*, Q.C., and Mr. *Appach*, for the Plaintiff:—

The main point is, whether an intention is disclosed in the will, that the charge on the estate at *Glenlee* should be paid out of the residuary real and personal estate.

The domicil being English, the law of *England* must govern the construction of the will as to whether it discloses an intention to pay the heritable debt out of any other than the heritable estate upon which it was charged. It is laid down in the case of *Trotter* v. *Trotter* (1), that if the domicil is in one country and the real estate in another, the question of intention as to the meaning of a will must be determined by the law of the country of domicil. The heritable bond, like all other bonds of a like nature, contains a personal obligation for payment of the money, and then the lands are charged in security of the personal obligation. The heritable bond gives a right of personal action against the debtor or grantor of the bond, and his executors and representatives, for payment of the sum for which the heritable security is granted; and the real or heritable security is added for the safety of the creditor, to the personal obligation of the debtor. This was settled in *Jerningham* v. *Herbert* (2), and the fact that the creditor has obtained real security for the payment of his debt,

(1) 3 Wil. & Sh. 407; 4 Bligh (N.S.) 502. (2) 4 Russ. 388.

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does not alter the right to demand payment in a personal action against the debtor or his representatives.

This debt was, therefore, a personal debt owing by the testator, and he has directed his debts to be paid out of his residuary personal estate. There has been a great contradiction among the authorities since *Locke King's Act* (17 & 18 Vict. c. 113), but the final conclusion is in the Plaintiff's favour—that is, in the case of *Eno* v. *Tatham* (1).

[The VICE-CHANCELLOR:—I always thought the case of *Woolstencroft* v. *Woolstencroft* (2) was a remarkably sound decision, until I was bound, by subsequent cases, to think otherwise.]

This present case is distinguishable from *Woolstencroft* v. *Woolstencroft*, for there the estate charged was part of the residuary heritable real and personal estate, out of which the debts were to be paid; whereas here, the testator has made his will in a form which does not touch the *Glenlee* estate at all, or any Scotch heritable property. In *Woolstencroft* v. *Woolstencroft*, the payment was to be out of the testator's estate generally, and the real estate being charged with all his debts, the executors would have the means of effecting a sale of part of the real estate, if necessary, for payment of the debts. That case is not, therefore, an authority against our argument, but is on a different species of gift altogether. It merely settles this, that where a mortgaged estate and personal estate are conveyed to the same trustees, then the direction for payment of debts does not indicate a contrary intention, because the testator may have intended that the mortgaged estate should bear its own burthen.

In *Eno* v. *Tatham* there was a bequest of personality to the executrix subject to the payment of debts, followed by a devise of real estate, part of which was subject to a mortgage, and this was held to be a sufficient indication of an intention, under *Locke King's Act*, that the real estate should not be primarily liable to the payment of the mortgage debt. There was a decision in conformity with *Eno* v. *Tatham* in the case of *Moore* v. *Moore* (3). It is clear, therefore, that the residuary estate in the hands of

(1) 4 Giff. 181. (2) 2 D. F. & J. 347.
(3) 1 D. J. & S. 602.

the Defendants, the trustees, is liable to exonerate the *Glenlee* estate from this charge of £14,143.

The next point is that of collation.

The property in *New Galloway* was purchased in 1864, which was two years after the date of this will, but the will did not affect that estate, as it has no dispositive words to pass an estate in *Scotland;* neither is the will attested according to the Scotch law. And there is nothing to be collected from the will which can put the heir to his election, or compel him to collate the heritable property in *Scotland,* or bring it into hotchpot. For that purpose *Maxwell* v. *Maxwell* (1) is a conclusive authority.

The remaining point is, whether the provisions made for maintenance and education of the children by the will, are in substitution of, or in addition to, the other provisions made by the settlement out of the *Glenlee* estate. By the trust disposition and settlement, the rents of a portion of the estate at *Glenlee* are directed to be paid to the widow for the purpose of keeping up the mansion-house, and for the maintenance, education, and advancement of the children. Then, by the will, the testator divides the estate into certain proportions among his children, but declares that their rights are not to vest till twenty-one, and there is a proviso that during the minority of any one or more of the persons entitled, by virtue of the will, either absolutely or in expectancy, to any part of the residuary trust property, the trustees shall receive the annual produce of such property, and shall apply the same, or a component part thereof, for their maintenance and education. We contend that the clause in the will is not substitutional for the provision out of the *Glenlee* estate for maintenance and education, but is additional, and the children take cumulatively so far as the *Glenlee* rents are not sufficient for the purpose of maintaining, educating, and advancing the five younger children left by the testator. It comes under the ordinary rule of law of maintenance given out of two different sums for different purposes.

Mr. *Osborne,* Q.C., and Mr. *Stallard,* for the trustees of the will, took no part in the discussion.

(1) 2 D. M. & G. 705.

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Mr. *Baily*, Q.C., and Mr. *Wickens*, for the widow of the testator, supported the view taken by the Plaintiff:—

From the terms of the bond, it is a personal liability as well as a security upon real estate. The testator has created a particular fund, and declared the trusts of it to be for the payment of his debts. That trust cannot be performed unless all the debts are paid out of it.

Mr. *Haddan*, for the Defendant *Wellwood Maxwell*, the second son of the testator, supported the Plaintiff's argument, and cited *Enohin* v. *Wylie* (1), as to the administration of the personal estate belonging to the Court of the country where the deceased was domiciled; and *Drummond* v. *Drummond* (2), to shew that the will and English law had excluded the Scotch law; and *Wilson* v. *Dunsany* (3), where it was held that the priorities of creditors were to be regulated by the domicil of the testator; and *Cust* v. *Goring* (4).

Mr. *Karslake*, Q.C., and Mr. *Neish*, for the younger children:—

Our contention is, that the Scotch estate must bear its own burthen, and the debt created by the heritable bond is not to be paid out of the residuary estate under the will. The incumbrance created by a heritable bond on a Scotch real estate is altogether a different incumbrance in its nature from a mortgage created by an English document upon an English estate. If the domicil of this gentleman had been Scotch, and he had died intestate, having mortgaged his estate by a heritable bond, the land would, under the law of *Scotland*, have been the primary fund for payment of the charge. By the law of *Scotland* it would require a much stronger expression of intention to exonerate an estate from a Scotch heritable bond than would be necessary according to the English rule; the Scotch law would require an express declaration by a testator that property capable of being disposed of by him for the purpose of paying his debts, should exonerate that particular estate from the particular debt. It would, consequently, require a different form of words—much more forcible—to exonerate the Scotch estate, to

(1) 10 H. L. C. 1. 8 Jur. N.S. 897.
(2) 6 Bro. P. C. 601.
(3) 18 Beav. 293. 18 Jur. 762
(4) Ibid. 383. 18 Jur. 884

bring the case within *Locke King's Act*, than if it were an English estate. The testator, in his will, refers to the trust disposition and settlement, and declares that the provisions of his will shall not in any manner affect the *Glenlee* estate. Then he gives all the residue of his estate, which excludes the *Glenlee* estate, to trustees, and charges it with his debts; by which he must have meant only his testamentary debts and legacies. Under these circumstances, it is evident he intended to leave the Scotch estate subject to any charges that might be effected upon it before his death.

The authorities cited afford very little assistance, as they are all more or less *dehors* the will in this case. The best treatise on the subject is the judgment of Vice-Chancellor *Wood*, in the case of *Mellish* v. *Vallins* (1), where he held there was a sufficient indication on the part of the testator that the land should not, under *Locke King's Act*, be primarily liable. But that was a case of an English will and English property. There His Honour had the opportunity of considering all the previous cases. The case of *Rowson* v. *Harrison* (2) is also a valuable one, in which all the other cases were cited, as well as *Pembrooke* v. *Friend* (3), and *Allen* v. *Allen* (4), and there the Master of the Rolls came to the conclusion that a direction to pay all debts out of the testator's personal estate was not a sufficient expression of a contrary or other intention so as to prevent a devisee of a mortgaged estate taking *cum onere* under *Locke King's Act*.

SIR R. MALINS, V.C.:—

First, it is agreed on all hands that the testator's domicil was English.

That being so, I have a will before me of a domiciled native Englishman, and the will therefore must, not only on principle, but on all the authorities, be construed by the English law. With regard to the point on Mr. *Locke King's Act*, the authorities have now settled that whenever a testator has mortgaged his estates, and by his will provides a fund, either his residuary personal estate, or an estate devised for the purpose, or the general personal estate and other property mixed up with it, or, in other words,

(1) 2 J. & H. 194. 8 Jur. N.S. 1865 (3) 1 J. & H. 132.
(2) 31 Beav. 207. (4) 30 Beav. 395. 8 Jur. N.S. 758

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when he provides a fund of any description whatever for the payment of his debts: that is an indication of an intention that the land is not to be the primary fund within Mr. *Locke King's Act;* but that the personal estate, or the particular fund provided, is to exonerate it from the mortgage debt. Now, in the present case it is not attempted to be denied, indeed I may take it as admitted on all hands, that the Scotch heritable bond executed by the testator constituted, in the strongest sense of the word, a debt for which he might have been sued in the tribunals of this country.

The simple question, therefore, to be asked, is, whether this is a debt which the testator owes, because if it is a debt, and one for which he may be sued, he has said in the most positive terms that out of a particular fund, namely, the residuary real and personal estate, it is to be paid. The trust is thus:—"Upon trust with and out of the moneys which shall come to their or his hands by virtue of the aforesaid residuary devise and bequest, and of the trusts relative thereto, to pay and discharge all my just debts, funeral and testamentary expenses."

The question I have to decide is, whether this Scotch bond, imposed on a Scotch estate, making a charge on a Scotch estate, is to be paid out of the fund provided by the testator? How is that to be answered? It is not only a debt, but a just debt for money he had received; and he has expressly said, out of this fund all his just debts are to be paid.

The argument against this has mainly turned on the clause in the will declaring that it shall take effect so as not to affect his *Glenlee* estate. Now, the circumstances under which this clause was inserted must be looked at. The testator had made a settlement of this *Glenlee* estate in 1859. His will was made in 1862. The settlement of his Scotch estate was for the benefit of his wife, his eldest son, and, in a contingent event, his second son. The will provides for all his children, and, having made the Scotch disposition of the estate, he recites that fact, and then, as I apprehend, merely for the purpose of shewing that by his will he does not intend to undo or to affect anything that he had done by the Scotch settlement, he says, "I hereby expressly declare that the devises, bequests, and provisions of this my will shall be construed and take effect so as not in any manner to affect my *Glenlee*

estate, or the trust disposition and settlement thereof, or to put to his, her, or their election, any person or persons who may claim both under such trust disposition and settlement, and this my will." In other words, he says: "What I have done with regard to the Scotch estate is to remain precisely as if I had made no will. It is not to be in any way affected."

What does he do subsequently? He borrows a sum of £14,000, and charges it by heritable bond on the Scotch estate. What does the will say? Inasmuch as he has now created a debt, the will provides a fund out of which the debt is to be paid, and having put a debt on the estate, his will takes the debt off again.

Therefore the result will be (and it is what I am satisfied the testator intended), that the *Glenlee* estate will be put into precisely the same situation as if he had never created that debt. That is the law as settled by *Moore* v. *Moore* (1).

If I might have indulged in my own opinion on *Locke King's Act*, I should have been inclined to follow *Woolstencroft* v. *Woolstencroft* (2), which I thought was good law, and if the Appeal Court had not decided the other way I should have gladly followed it; but the authorities have completely overruled that decision of *Woolstencroft* v. *Woolstencroft*, particularly *Moore* v. *Moore* and the other cases cited, and it is settled that *Locke King's Act* is entirely excluded from the case by the contrary intention shewn by the testator.

I must make a declaration that the fund provided by the clause in the will, that is, the residuary real and personal estate, is the primary fund for the payment of that Scotch heritable bond.

The next point is, whether the will puts the heir-at-law to his election with regard to the *Galloway* estate. I am clearly of opinion, upon the authority of the case of *Maxwell* v. *Maxwell* (3), that the will does not put the heir-at-law to his election, and, therefore, that he has the same right to that Scotch estate as if there had been no will at all.

The only other point is, whether the children are entitled to the provision made for maintenance by the Scotch deed, and to the provision made by the will.

(1) 1 D. J. & S. 602. (2) 2 D. F. & J. 347. 6 Jur. N.S. 1170

(3) 2 D. M. & G. 705.

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I am of opinion that the provision made by the will is an additional provision, and that whatever they take under the will they take in addition to the settlement.

There must, consequently, be a declaration to that effect.

The costs of all parties will come out of the estate.

Solicitors for all parties: Messrs. *Duncan & Murton.*

V.-C. M. 1867 *May* 3.

In re BENHAM'S TRUST.

Presumption of Death—Expiration of Seven Years.

Where a man has not been heard of for seven years, there can be no presumption of his death until the expiration of that period; those who allege the death within that period are bound to prove the fact. Consequently, where a legacy was left to a man who was last heard of in 1854, by a testator who died in 1860, the legacy was held not to have lapsed, but to be payable to his personal representatives.

WILLIAM BENHAM, by his will, dated the 17th of December, 1855, gave the residue of his real and personal estate to trustees upon trust, after payment of his debts and legacies, to sell and divide the proceeds into two parts; and as to one moiety thereof, upon trust to divide and transfer the trust moneys and securities constituting such moiety between and amongst the six nephews and nieces of his late wife, to be equally divided between them as tenants in common, for his and her own use and benefit respectively; and the testator declared that, if either of the persons thereinbefore named to whom any legacy or share of property was given by his will should die in his lifetime, or before the same respectively should become payable, leaving a child or children him or her surviving, the legacy or share of each such parent should go and belong to his or her child or children, and be paid and disposed of as his trustees should think most advantageous for the person or persons entitled thereto.

The testator died on the 27th of August, 1860, and his will was proved on the 8th of September, 1860.

Thomas Davies, a nephew of the testator's wife, and one of the

persons named in his will as equally entitled to share in the aforesaid moiety of the residuary estate, married *Charlotte Skinner*, and many years ago went to reside in *America*.

The said *Thomas Davies* was in the habit of leaving his wife, and absenting himself from her for periods of some duration.

In the year 1854, he was residing with his wife at *Attleboro'*, in *Rhode Island*, and during that year he left *Attleboro'*, and went with his wife to reside at *Lanesville*, about eight or nine miles from *Attleboro'*, and in the summer of the year 1854 he left his wife, and no tidings or communications had been received of or from him since the year 1854, notwithstanding frequent inquiries made concerning him by *Charlotte Davies*, his wife.

After the death of the testator, *William Benham*, the trustees realized the property left by him, and a sixth part of the moiety of the residue, being the share payable to *Thomas Davies*, if living, was invested in the sum of £909 1*s.* 11*d.* consols, and was transferred into the name of the Accountant-General, to the credit of an account entitled "In the Matter of the Trusts of the Will of *William Benham*," and the dividends which had since accrued had been paid to the same account.

The Petitioner, *Benjamin Davies*, the brother of *Thomas Davies*, submitted that, under the circumstances aforesaid, the said *Thomas Davies* must be presumed to have survived the testator, and to have died in the year 1862, or 1861 at the earliest, intestate, leaving his widow, *Charlotte Davies*, and the Petitioner, his sole next of kin.

Charlotte Davies died intestate, on the 20th of September, 1866, at *Pawtucket*, in *America*, and *Thomas Davies* never had any child.

Letters of administration of the personal estate and effects of *Thomas Davies* were granted to the Petitioner.

The Petition prayed that the amount so paid in by the trustees, in respect of the share to which *Thomas Davies* was entitled under the will, might be transferred to the Petitioner, after deducting the costs incurred in the matter.

Mr. *Roxburgh*, Q.C., and Mr. *Graham Hastings*, in support of the Petition:—

It was decided in *Lambe* v. *Orton* (1) that where a person has

(1) 29 L. J. (Ch.) 286.

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not been heard of for seven years, there is no presumption of law that he died at any particular period during that time, and in *Dunn* v. *Snowden* (1), where a legatee had not been heard of since the year 1848, and there being no evidence to fix the death at any particular period, it was held that he had died subsequently to the testator, who died in 1851. If you cannot presume any particular period of death during the seven years, it must be assumed that he was living during the whole of the seven years. In this case it follows that the legatee, *Thomas Davies*, cannot be presumed to have died before the year 1862, or, at the earliest 1861, since he was last heard of in 1854, and was therefore alive at the death of the testator in 1860. The same principle was adopted in *Thomas* v. *Thomas* (2), and in *Re Smith* (3).

Mr. *Taylor*, *contrà* :—

It is for the Petitioner to prove that *Thomas Davies* was alive in the year 1860. He was not heard of after 1854, and, in all probability, he died immediately afterwards, or he would have communicated with his wife. No time can be fixed upon during the first six years at which he can be said to have been alive, he must, therefore, have been dead at the death of the testator in 1860.

In *Dowley* v. *Winfield* (4), the legatee went abroad in 1830, on board a ship, and the testator under whose will he claimed died in 1833, the legatee had been last heard of twenty months before the death of the testator, and the Court there ordered the share to which the legatee would have been entitled to be transferred to the testator's next of kin; and in *Nepean* v. *Knight* (5), Lord *Denman* said, the presumption of the fact of death seemed to lead to the conclusion that the death took place some considerable time before the expiration of the seven years; and he also observed that of all the points of time within the seven years, the last day was the most improbable, and most inconsistent with the ground, of presuming the fact of death. The presumption of law related only to the fact of death, and the time of death must be the subject of

(1) 32 L. J. (Ch.) 104. (3) 31 L. J. (P. & M.) 182.
(2) 2 Dr. & Sm. 298. (4) 14 Sim. 277.
(5) 2 M. & W. 894.

distinct proof. It was therefore held that there could be no legal presumption as to the exact period of death. So, in *In re Creed's Trust* (1), it was held that there was no presumption of death at any particular period.

Mr. *Eddis*, for parties interested under the will.

SIR R. MALINS, V.C. :—

The case of *Dowley* v. *Winfield* (2) is rather in favour of Mr. *Taylor's* argument, but it appears to me that that case turned upon its own particular circumstances, and the Vice-Chancellor authorized the amount of the legacy to be given up to the next of kin only upon his giving security to refund it in case the missing legatee should be living, or should have died after the testator.

The general rule, which is well established, is, that a person not being heard of is considered to be dead at the end of seven years. But it is laid down in *Nepean* v. *Knight* (3), that there can be no presumption of death at any particular period within that time. The law only presumes the fact of the death, but not that it took place at the beginning or the end of the particular period of seven years.

All that is presumed is, that he is dead when the seven years have expired. But if you cannot presume death at any particular period during the seven years, then, at the end or expiration of the seven years, you must presume for the first time that he is dead, and you must also presume that within that time he is alive. I agree that, on the probabilities of the case, he may be supposed to have died before the end of the seven years, as that would, in fact, account for his silence. But the rule which I have referred to was established for general convenience, the true principle being that those who argue for the death at or within any particular period are bound to prove the fact. In this case *Thomas Davis* was the residuary legatee under the will of a testator who died in 1860, and if *Thomas Davis* was alive in 1860, when the testator died, he took what was bequeathed to him; if he died

5 Ch. 144

(1) 1 Drew. 235. (2) 14 Sim. 277.
(3) 2 M. & W. 894.

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before that time, the legacy lapsed, and went to the next of kin. Now, the next of kin must prove, as a presumption of law, that he actually died in the lifetime of the testator; and here there is no such proof. It is clear that he was heard of in 1854, and, therefore, there is no presumption of law that he was dead in 1860 when the testator died.

This principle has received statutory authority, for where a lessee is not heard of for seven years, the landlord may re-enter; and so it is also clearly settled that where a woman's husband is not heard of for seven years, she may marry again, and, if she does so after the expiration of the seven years, she does not commit the crime of bigamy; and if her first husband comes back, although she is the wife of the first husband, by marrying another man in the meantime, she has not been guilty of any crime. My predecessor, Sir *R. Kindersley,* in fact decided this very point, because he decided that where a legatee had not been heard of for three years before the death of a testator, he must be presumed to have survived him, and, acting on that presumption, he, in effect, decided that he must be taken not to have died either at the end or the beginning of the seven years.

So, also, he decided in *Lambe* v. *Orton* (1) and in *Thomas* v. *Thomas* (2); and in *Re Smith* (3) the Court of Probate acted on the same principle.

It is clear that Sir *R. Kindersley* entirely adhered to that view in *Dunn* v. *Snowden* (4). I think, therefore, that the general rule, adopted for convenience, is a very proper rule, and that those who assert that a person died at any particular period must prove that he did so die. Here there is no proof of the legatee having died before the testator, and, therefore, he must be taken to have been living at the time of the testator's death. His legal personal representative is therefore entitled.

Solicitors for the Plaintiff: Messrs. *Deane & Chubb.*
Solicitors for the Defendants: Messrs. *Johnson & Master.*

(1) 29 L. J. (Ch.) 286.
(2) 2 Dr. & Sm. 298.
(3) 31 L. J. (P. & M.) 182.
(4) 32 L. J. (Ch.) 104.

LANFRANCHI *v.* MACKENZIE.

V.-C. M.
1867
March 5, 6.

Prescription—Ancient Light—Light necessary for Special Purpose or Trade.

In order to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to an ancient window; open, uninterrupted, and known enjoyment of such light in the manner in which it is at present enjoyed and claimed must be shewn for a period of twenty years.

THIS was a suit by Messrs. *Lanfranchi & Co.*, to restrain the Defendants from erecting a new building in such a manner as to interfere with the access of light to a window which they alleged was an ancient light.

The Plaintiffs, who were silk merchants, carrying on a very large business, had for fourteen years occupied the basement, the whole of the ground floor, and one room on the first floor of the house No. 5, *Crown Court*, in the City of *London*, and they held the same premises for the residue of a term which would expire at Lady Day, 1873, at the rent of £100 a year.

The front room of the ground floor, looking into *Crown Court*, was used by the Plaintiffs as a sample-room, where their customers were in the habit of attending for the purpose of examining samples of raw silk.

The Defendants, who were the owners of No. 1, *Crown Court*, which stood on the north side of the court, in June, 1866, pulled down the old buildings thereon, and at the time the bill was filed had erected a new building on its site to about the height of the old building; but it being apparent that the Defendants were intending to raise it to an additional height, the Plaintiffs, in February, 1867, instituted the present suit. The cause came on upon motion for an injunction on the 18th of February, but the motion stood over to complete the evidence, and it was arranged that the cause should be brought on upon motion for decree. The Defendants were placed under no undertaking, but it was understood that they would proceed with their building at their own peril. Since the filing of the bill the Defendants had completed their building, which was now forty-nine feet high, with a sloping

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roof two feet six inches higher, while the old building was forty-two feet three inches to the top of the roof. It appeared that *Crown Court* is eighty-four feet long, and, opposite the Plaintiff's house, thirty-two feet broad. The Defendants' house was not opposite the Plaintiffs' window, but thirty-seven feet six inches distant from the nearest point of that window.

The evidence as to the effect of the new building on the access of light to the Plaintiffs' sample-room window was very conflicting, many witnesses being cross-examined *vivâ voce* in Court on each side. The case set up by the Plaintiffs was, that a steady uniform light was necessary for a room used as a sample-room for examining raw silk; that the room in question had, prior to the new erection, enjoyed a good steady light, well suited for the purpose; but that the new erection had materially altered the light, the effect being, that in the morning the light was diminished in quantity, while in the afternoon, when the sun shone on the part of the new erection which was higher than the old building, it threw a reflected light on the window, which, though greater in quantity than the light formerly enjoyed, was, in consequence of its being a glaring, and not an uniform steady light, quite unsuited for the purpose of sampling raw silk.

Mr. *Glasse*, Q.C., and Mr. *Hemings*, for the Plaintiffs:—

The right of the Plaintiffs is to have the free uninterrupted use of the light coming to their ancient window, without reference to the purpose for which that light has been used, and if their trade is interfered with by a new building, they are entitled to the protection of the Court. That is the effect of the recent cases, and it is of no avail to say that the Plaintiffs can carry on their business with the light remaining, or that such light is as good as other persons in the same business enjoy: *Dent* v. *Auction Mart Company* (1); *Yates* v. *Jack* (2); *Martin* v. *Headon* (3).

The Defendants having proceeded with, and finished, the building since the case came on upon the motion for an injunction, the Plaintiffs now ask the Court for a mandatory injunction.

(1) Law Rep. 2 Eq. 238. (2) Law Rep. 1 Ch. 295.
(3) Law Rep. 2 Eq. 425.

Mr. *Cotton*, Q.C., Mr. *Wickens*, and Mr. *Watkin Williams* (of the common law bar), for the Defendants:—

The interference with the Plaintiffs' light in this case is not such as the Court would restrain, except on the ground of the extraordinary amount and quality of light required for the purposes of a sample-room, for which the room in question is used. According to the Plaintiffs' own witnesses, the damage chiefly complained of is not so much the diminution of light as the alteration in its quality caused by the additional reflected light; and although in the case of water the Court would interfere to restrain an alteration in quality, no such jurisdiction has ever been exercised in the case of light.

With regard to the diminution of light, the injury is not so material as would induce the Court to interfere: *Attorney-General* v. *Nichol* (1); *Walter* v. *Selfe* (2); *Soltau* v. *De Held* (3); *Jackson* v. *Duke of Newcastle* (4).

There is no authority shewing that a Plaintiff may, even by twenty years' user, acquire a right to a special kind of light. But even if he could, the *Prescription Act* requires that the access and use of light should have been actually enjoyed for twenty years, and user for the special purpose of sampling is shewn only for about fourteen years. A Plaintiff having an ancient window cannot, by any peculiar user of it for any period less than twenty years, acquire the right to a special amount or quality of light; if he could, any user, however short, would be sufficient; and no man can, by any act of his, suddenly impose a new restriction upon his neighbour: *Martin* v. *Goble* (5).

The right to light is not proprietary, but is only an easement acquired by prescription; and to be so acquired it must have been enjoyed openly; and even twenty years' user would not be sufficient if it was not for an ordinary and known purpose: *Gale* on Easements (6); *Aldred's Case* (7); *Kent's* Commentaries (8). The *Prescription Act* (2 & 3 Will. 4, c. 71) has not altered the nature of the right acquired: *Daniel* v. *North* (9).

(1) 16 Ves. 338.
(2) 4 De G. & Sm. 315.
(3) 2 Sim. (N.S.) 133.
(4) 12 W. R. 1066. 10 Jur. N.S. 688
(5) 1 Camp. 320.
(6) Will's Ed. 179.
(7) 9 Rep. 57 b.
(8) Vol. iii. p. 554, Part vi. Lec. 52, § 448.
(9) 11 East, 372.

(4) 3 Deg. J. S. 275.

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This Court will not interfere by mandatory injunction, except in cases where extreme or very serious damage would ensue from its interference being withheld: *Durell* v. *Pritchard* (1); and no such damage is shewn here. Moreover, the Plaintiffs have been guilty of such delay as would disentitle them to an order to pull down the new building. The only remedy the Plaintiffs are entitled to, if at all, is to damages.

Mr. *Glasse*, in reply:—

The question in this case does not depend on the special user for twenty years. Up to the passing of the *Prescription Act*, the right to light was an easement proper, founded on grant, and was limited by the extent of user; and therefore I admit that *Martin* v. *Goble* (2) was properly decided. But since that case the *Prescription Act* has altered the state of the law; and *Tapling* v. *Jones* (3) has decided that the right to light is not to be looked at as an easement, but as a right acquired to the utmost possible amount of light which can enter into the aperture of the window; and the *Prescription Act* conferring an absolute indefeasible right to the whole light, the question of user for any particular purpose for twenty years or less is perfectly immaterial.

In *Durell* v. *Pritchard* the buildings were completed before bill filed, which was not the case here; and if the Plaintiffs succeed, the Court will order the new erection to be pulled down.

Sir R. Malins, V.C.:—

Two questions arise on the Plaintiffs' claim to relief—namely, whether they have made out such a case as would entitle them to the interference of the Court by injunction, if the room in question had been used for the ordinary purposes of business; and, secondly, if not, are they so entitled on the ground of the extraordinary amount of light they require for the particular purpose for which they have used the room, namely, as a sample-room?

Upon the first question—namely, as to whether they would have been entitled to an ordinary injunction of any kind—the conclusion at which I have arrived is, that they have not made out a

(1) Law Rep. 1 Ch. 244. (2) 1 Camp. 320.
(3) 11 H. L. C. 290.

case for relief; and that if the room had been used as a counting-house, or for any other ordinary business purpose, they have not established a case in which the Court would interfere.

There are certain things one does not require evidence upon, in which, to use an expression of Lord *Cranworth's*, in *Yates* v. *Jack* (1), *res ipsa loquitur*. This house of the Defendants is on the north side of the court, the rooms of the Plaintiffs have all but a direct eastern aspect, and if a person is looking out of the window, the first obstruction to his view, looking straight before the window, is the house at the east end of the court. The window has the morning light from the east, and this building of the Defendants, being on the northern side of the court, does not, in the slightest degree, intercept the direct view. The sun, towards the afternoon, gets round to the west; and the evidence of the Plaintiffs themselves is, that, as soon as it goes round to the west, it strikes the increased height of this building of the Defendants; and all the witnesses agree that, from that time, there is an increase in the quantity of light. No case has ever occurred in which this Court has interfered to prevent a person from erecting a building which has had the effect of increasing the quantity of light; and I apprehend no such case can occur; at all events, I shall not be the first Judge to come to such a decision.

Now, if I divide the day into forenoon and afternoon, the utmost effect that can be given to the evidence of the Plaintiffs is, that in the forenoon there is some slight diminution of light. But supposing there is the slightest diminution of light, this Court does not interfere for every slight diminution. Mr. *Glasse* has argued that a man is entitled to all the light that can come through a certain aperture, and I quite agree that he is entitled to the whole of the light. But if other persons have certain rights, such as these Defendants have, to pull down an old house and erect a new one on the site, and make the new house higher than the old one was, and they do so without materially injuring their neighbours, that is their right, as the right of the Plaintiffs is to prevent any material diminution of their light, or any material diminution of the advantages which they have hitherto enjoyed. But there is no rule in this Court that a Plaintiff is entitled to every particle of

(1) Law Rep. 1 Ch. 295. 12 Jur (N.S.) 805

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light he had before the alteration took place in the property of his neighbour. The rule of the Court, after all which has been stated more than once on both sides in the course of the argument, in all these cases which have been so much discussed the last few years, and the last two or three years particularly, in *Clarke* v. *Clark* (1); *Yates* v. *Jack* (2); *Dent* v. *Auction Mart Company* (3); comes back at last to the sound rule laid down by Lord *Eldon*, which I quote now as quoted by Sir *W. Page Wood* in the case of *Dent* v. *Auction Mart Company*, which is this: "I repeat," says Lord *Eldon*, "the observation of Lord *Hardwicke*, that a diminution of the value of the premises is not a ground; and there is as little doubt that this Court will not interpose upon every degree of darkening ancient lights and windows. There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained, or an action upon the case, which, however, might be maintained in many cases which would not support an injunction." So that Lord *Eldon* lays down the rule that there may be such a diminution as would entitle to damages at law, but it does not follow that though there be such a diminution of light as will entitle a Plaintiff to damages at law, this Court will therefore grant an injunction.

Looking at the evidence on both sides, and having regard to the fact that the Plaintiffs' case rests on the injury which they sustain in consequence of the extraordinary purpose for which they use the room, I come to the conclusion that there is not in this case that material interference with the right of the Plaintiffs, or that material diminution of the quantity of light which hitherto flowed to their window, which would justify this Court in interfering if this had been a room used for the ordinary purposes of business.

Then I come to the second, and, perhaps, the still more important question, whether I should be justified in interfering upon the ground of the extraordinary purpose to which this room has been applied. Now, in order to arrive at a conclusion upon that subject, I think one must look a little at the principles upon which this rule as to ancient lights is established. Mr. *Glasse* has referred me to a case of *Jones* v. *Tapling* (4), and has argued that it now depends not

(1) Law Rep. 1 Ch. 16. (3) Law Rep. 2 Eq. 238.
(2) Ibid. 295. (4) 11 H. L. C. 290.

on the common law, or the ancient principle, but upon the statute. I do not understand the statute to have made any difference. I only read the statute as meaning this (and I believe it has been uniformly so read), that there was no absolute period theretofore, but now the period is fixed at twenty years. The third section of that statute enacts: "That when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding;" one great object being to abolish the local customs in the City of *London*, and not enable any man to block up the windows of his neighbour, "unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for the purpose by deed or writing."

The cases since that statute have proceeded upon the same principle as before; namely, that in order to establish the right to an ancient light you must shew that there has been an undisturbed peaceable enjoyment. Mr. *Watkin Williams* put it, I think, with perfect accuracy in his argument. There must be an open, peaceable, undisturbed enjoyment, for the period of twenty years. Now, what is this enjoyment? If a man has the use of a window for ordinary purposes, he is entitled to have it for all the purposes for which he has enjoyed it; but it does not follow that, because he has used it for a particular purpose for less than twenty years, that he therefore can establish his right to such particular user for that particular period. Many observations have been made on the case of *Martin* v. *Goble* (1), but I have always understood *Martin* v. *Goble* to be law, and I understand it to be law now. It certainly is founded on good sense. I shall regard it as law, and I shall treat it as my guide in this case. In *Martin* v. *Goble* the case was this:—The building in question, which had stood between thirty and forty years, and had been formerly used as a malt-house, was conveyed to the Plaintiffs about seven years previously for the use of the inhabitants of a parish, when it was converted into a parish workhouse; and since that time it had been inhabited by the paupers belonging to the parish, and what was

(1) 1 Camp. 320.

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sought to be established was the right to the use of such a quantity of light as was suitable to a building which had been used as a dwelling-house for seven years only, while for twenty years there had been only a quantity of light necessary for a malt-house. The Chief Baron, Sir *Alexander McDonald*, laid down the law in a manner to which I entirely assent, as follows: "The house was entitled to the degree of light necessary for a malt-house, not for a dwelling-house. The converting it from the one into the other could not affect the rights of the owners of the adjoining ground. No man could, by any act of his, suddenly impose a new restriction upon his neighbour." Now, it must be borne in mind that this right to an ancient light is a restriction upon the rights of the neighbour; because if there be the use of an ancient light the neighbour cannot build on his land in such a manner as to interfere with that ancient light. Therefore the restriction is a restriction upon his right. As I understand the law, and as I intend to act on it, it is this, that unless you can shew there has been that open uninterrupted enjoyment of the light in the manner in which it is at present enjoyed for twenty years, there is no right whatever to interfere with the proceedings of the neighbour.

Now, in this case it has been argued, and I think Mr. *Glasse* carried his argument to that extent, that, assuming, for the sake of the argument, there would be no right in the Plaintiff to come for the interference of the Court on the ground of the ordinary use of this property, directly it is turned to an extraordinary use such as a room for a painter, for an artist, or for examining diamonds by a diamond merchant, or, as in the present case, examining silks by a silk merchant, you have a right so to interfere with the proceedings of the neighbour, that a building which he might have erected, if it had not been for this particular use of the light, he has no longer a right to erect. But then the rule comes into operation that it must be an open, well-known, and uninterrupted user. There is not a particle of evidence in this case to prove that the Defendants ever knew that this room was used for the purpose of examining silk at all; if the Plaintiffs had communicated to them that fact before they commenced the building, it is very possible they might have adapted their plans and designs to meet their views. It was incumbent upon the Plaintiffs to have

given them the earliest possible notice of the fact, in order that they might not be taken by surprise and have rights claimed which could not have possibly been claimed but for the particular user of the room.

As this question has now come before the Court for decision, for the first time, as far as I am aware, I do not intend, as far as my judgment is concerned, to leave it in the slightest doubt. It is clear, that if a man has the use of a window looking over his neighbour's property, and he continues to use that window for twenty years, the very day the twenty years expires a material alteration takes place in the rights of his neighbour as to building. The day before the twenty years expires he can erect any building which shall have the effect of diminishing the quantity of light which goes to that window, but on the expiration of the twenty years, the rights are most materially altered. Then is a man suddenly to alter the rights of another? Take the present case. Suppose Messrs. *Lanfranchi & Co.* had occupied this room as an ordinary counting-house up to the 1st of January, 1865, I have already given my opinion that in that state of things the Plaintiffs could have made no case against the Defendants; and it follows that, up to the 1st of January 1865, these Defendants would have had the right to raise their building to the extent they have; but, according to the argument of the Plaintiffs, if these gentlemen proceeded to use this room for a totally different purpose on the 1st of January, 1865, the very day they commenced using it for that particular purpose the rights of the Defendants would have been altogether altered, and their right to raise their building from that day have absolutely ceased. It appears to me that this falls within what Sir *Alexander McDonald* said in *Martin* v. *Goble* (1): "No man can, by any act of his, suddenly impose a new restriction on his neighbour." These gentlemen, by using this window for the purpose of sampling silk, would suddenly and without notice impose this new restriction on their neighbours, that whereas up to that day they might have raised the building higher, after that day they could not.

It was suggested in argument, that one side of a street may be built, the street being twenty, or thirty, or forty feet wide, as the case may be, I will take it at forty feet wide, and the owner of the

(1) 1 Camp. 320.

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land at the distance of forty feet from the front of the houses has a continuing right vested in him to build at the other side of the street and to erect houses of the ordinary height; but it might be that the day before he proposed to erect the buildings some artist had set up his studio there, painted very near the window, and wanted a particular kind of light; or a diamond merchant wanted a particular kind of light to examine his diamonds; or a silk merchant his silks. According to the argument of the Plaintiffs, if the day before the buildings had been commenced he had set up that right, he would have deprived the owner of the land of exercising the rights over it which he would have had up to that day. I intend to decide this case on broad general principles, and my view of the law is this, that if there be a particular user, and the quantity of light claimed for that is such as would not belong to the ordinary occupations of life, a person who claims that extraordinary quantity of light cannot establish his right to it unless he can shew that he has been in the enjoyment of it for twenty years. If a man cannot establish a right within twenty years to an ordinary quantity of light, how can he establish in a less period the right to an extraordinary quantity? All he can establish is the right to the quantity of light he would be entitled to for ordinary purposes. If he has been in the enjoyment of an extraordinary user for twenty years, that would establish the right against all persons who had reasonable knowledge of it. It was argued that even after twenty years it would not do, if the person had not knowledge of it. It is not necessary to say anything on that subject. I think there is great force in the argument. I am by no means stating that the Plaintiffs would be entitled to succeed in that case unless they could shew the Defendants had knowledge of the use of these rooms for a particula r purpose, because it would be the height of injustice for a man using a room for a particular purpose to say that his neighbours should be bound by a circumstance of which they had no knowledge, and which the man claiming the right never gave them the opportunity of knowing. I am by no means prepared to say that even if the twenty years had elapsed in this case, the Plaintiffs would have been entitled to succeed on the extraordinary user, unless they could shew the Defendants had been aware of that extraordinary user. It

is not necessary to decide that point in this case; it has not been attempted to be shewn here. The evidence in this case shews that they commenced their occupation fourteen or fifteen years ago, at all events within twenty years; and therefore they could not establish their right to enjoyment for that period, which I think is essential to give them the right they claim in this case.

On this question of particular user for twenty years I asked the Plaintiffs' counsel to supply me with authority, and Mr. *Glasse* referred to one passage in the judgment of Lord *Cranworth*, in the case of *Yates* v. *Jack* (1). I have looked into the cases, but could find no authority on the subject; and his argument mainly relied on that passage. Now, Lord *Cranworth* says this: "It is comparatively an easy thing to shade off a too powerful glare of sunshine, but no adequate substitute can be found for a deficient supply of daylight; and an attentive consideration of the evidence of the trade witnesses, on the one side and on the other, has led me to the conclusion, as did the evidence of the architects, that the erection of the new buildings will materially interfere with the quantity of light necessary to the Plaintiffs in the conduct of their business. I desire, however, not to be understood as saying that the Plaintiffs would have no right to an injunction unless the obstruction were such as to be injurious to them in the trade in which they are engaged. The right, conferred or recognised by the statute 2 & 3 Will. 4, c. 71, is an absolute, indefeasible right to the enjoyment of the light, without reference to the purpose for which it has been used. Therefore, even if the evidence satisfied me, which it does not, that the Plaintiffs will still have sufficient light remaining, I should not think the Defendant had established his defence unless he had shewn that, for whatever purpose the Plaintiffs might wish to employ the light, there would be no material interference with it." But it is plain that Lord *Cranworth* was there directing his attention to a case where the Plaintiffs are claiming only the ordinary degree of light—that is, such a light as a person is entitled to for ordinary purposes; and the argument of the Defendants there was that it was not necessary for them to have the ordinary quantity of light, because the business which they were carrying on was one which required a diminished light only; and

(1) Law Rep. 1 Ch. 297. 12 Jur. N.S. 307

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Lord *Cranworth* said that was an argument he did not accede to. They had used the light for twenty years, for the ordinary purposes; and although they did not require it then for a purpose which required the full benefit of that light, yet they were entitled to it to the full extent to which they had had it for twenty years. It is not saying that a person who uses it for an extraordinary purpose for twenty years has therefore established the right, but rather shewing that their ordinary rights were not to be diminished by the particular use to which they had applied them.

On all these grounds, therefore, I come to the conclusion, that so far as the Plaintiffs have attempted to establish the case for a right to an injunction on the ground of interference, or diminution of light for ordinary purposes, their case has wholly failed.

It is not necessary for me to express any opinion whether they have failed or succeeded in shewing a material loss of light required for extraordinary purposes; though, upon the whole weight of evidence, I am satisfied that, even for the extraordinary purposes, they have failed to establish a case of material injury.

The bill, therefore, must be dismissed with costs.

Solicitor for the Plaintiffs: Mr. *J. W. Sparrow.*

Solicitors for the Defendants: Messrs. *Mackenzie, Treherne, & Trinder.*

V.-C. M. 1867 June 13, 14, 28.

HILTON *v.* WOODS.

Solicitor and Client—Champerty and Maintenance—Costs—Compensation for wrongfully working a Coal Mine.

The Plaintiff agreed with a solicitor to give him a portion of the profits arising from the successful prosecution of a suit to establish his right to certain coal mines, upon being indemnified against the costs of the proceedings:—

Held, that the contract amounted to champerty and maintenance, but the Plaintiff was not disqualified from suing, since his title was vested in him before he entered into the illegal contract. A decree was therefore made in his favour, but without costs.

If, however, the solicitor had been the party suing by virtue of a title derived under such a contract, his bill would have been dismissed.

In assessing compensation for coal already gotten by the Defendant, the

Court, being of opinion that he had worked it inadvertently, and not fraudulently, *held* that he was to pay only the fair value of such coal, as if he had purchased the mine from the Plaintiff.

THIS bill was filed for the purpose of establishing the Plaintiff's right to the coal mines under certain lands, containing about forty-seven acres, at *Blackrod*, near *Wigan*, in the county of *Lancaster*.

It was proved in the cause that *James Hilton*, the Plaintiff's father, was seised in fee of the lands in question in and prior to the year 1820, that he, together with his mortgagees, by lease and release of the 26th and 27th of January, 1820, conveyed them to one *Nicholas Marsh*, reserving to himself in fee all the mines and beds of coal lying thereunder; and that the mines descended on the Plaintiff as his father's heir.

The surface of the lands so conveyed to *Nicholas Marsh* had, in the year 1853, become vested in Mr. *Dodsley*, who sold them to the trustees of a will, under which Lord *Kingsdown* was the tenant for life.

The Defendant *Henry Woods* was the owner of adjacent mines, and in the year 1859, being desirous of working the mines now in question from an adjoining pit, he endeavoured to discover the owner of them.

Lord *Kingsdown* set up no claim to these mines, and, under the circumstances, the Defendant applied to Mr. *Dodsley*, the former owner of the surface, and it was then considered that if no other owner could be found Mr. *Dodsley* would be entitled, and after some negotiation between the Defendant and Mr. *Dodsley*, the latter, in consideration of £800, conveyed the mines under nine acres of the land, to the Defendant, and under such supposed title the Defendant proceeded to work the coal.

At this period the Plaintiff was in complete ignorance of his title, and so he would have remained if he had not been informed of it by Mr. *Wright*, who was the agent and local solicitor of Lord *Kingsdown*.

The bill was filed in April last, and it prayed an injunction to restrain the Defendant from continuing to dig and get coal or cannel under any of the lands belonging to the Plaintiff; that an account might be taken of the coal which had already been worked or procured by the Defendant, and the prices obtained by him for

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the same; that an account might also be taken of the coal which had been brought through the Plaintiff's mines, so worked by the Defendant, from other mines, and that the Defendant might be ordered to pay a proper sum for the advantage he had derived from bringing such coal through the Plaintiff's mines, and that the Defendant might pay the costs of this suit.

The Defendant, in an affidavit filed in the cause, stated that in the year 1858 he was the lessee of the coals under the lands of Mr. *Haliburton*, adjoining the *Shoemaker's Fold* estate, which formed part of the property upon which the coal was now claimed by the Plaintiff, and being desirous of buying the coals under the latter estate, he applied to Lord *Kingsdown's* solicitor to sell the mines to him, but was informed that Lord *Kingsdown* was not the owner of the mines. He then made further inquiries, and heard that Mr. *Dodsley* was the owner of the mines, and he entered into negotiations with Mr. *Dodsley*, who stated that no person had a better title to the mines than himself. In pursuance of these negotiations, an indenture, dated the 20th of October, 1859, was executed between Mr. *Dodsley* and the Defendant, whereby, in consideration of £800 paid to *J. Dodsley* by the Defendant, the said *J. Dodsley* conveyed to the Defendant and his heirs all the estate, right, title, and interest, at law and in equity, of him, the said *J. Dodsley*, in all and every the mines, minerals, and metals, under or upon the lands and hereditaments called the *Shoemaker's Fold* estate. That the said *J. Dodsley* at the same time made a statutory declaration that he had been in possession of the estate called *Shoemaker's Fold* from December, 1841, up to the year 1854, when he sold and conveyed the same (excepting the mines thereunder) to the trustees of the late Sir *Robert Leigh*, and during the whole period of his possession no claim was made by or on behalf of any person to the mines. The Defendant further stated that he had not worked the coals surreptitiously, but that the fact of his working them was a matter of notoriety, and the mines had been visited by several mining surveyors resident in the neighbourhood.

The Plaintiff, upon being cross-examined in Court upon his affidavit filed in support of the bill, stated that he was a stock-broker; that about eighteen months ago Mr. *Wright*, who was the

agent of Lord *Kingsdown's* estates at *Wigan*, called upon him and asked if he was aware that he was entitled to some coal mines under the *Hilton House* estates. Witness expressed his doubt as to his title, and did not at first feel willing to insist upon it. Mr. *Wright* then said he was so clear about it that he would guarantee him against any costs. An arrangement was thereupon verbally made between him and Mr. *Wright* to the effect that in consideration of such guarantee Mr. *Wright* should have a portion of the value of the property, that is, whatever he should make of it. Witness then searched among some old papers, and found certain deeds, and a variety of other papers, which were the foundation of his title.

Mr. *Baily*, Q.C., and Mr. *Wright*, for the Plaintiff, submitted to the Court the evidence of the Plaintiff's title to the coal mines in question, and asked for a decree in the terms of the prayer.

Mr. *Glasse*, Q.C., and Mr. *Martineau*, for the Defendant:—

After the evidence which has been adduced by the Plaintiff in support of his title, it is impossible to contend that he is not the person entitled to the coal which has been worked by the Defendant, but we submit that the bill must be dismissed on the ground that the agreement entered into between the Plaintiff and Mr. *Wright* amounted to champerty and maintenance, and was an illegal contract. But if the Court should sustain the bill, we contend that at any rate the Plaintiff is not entitled to costs. The suit was instituted on the footing of an arrangement that Mr. *Wright* should guarantee and indemnify the Plaintiff against the costs; and, in consideration of this indemnity, the Plaintiff was to hand over a portion of the profits arising from the property to Mr. *Wright*.

In *Reynell* v. *Sprye* (1), where a person undertook the establishment of the claimant's rights on the terms of guaranteeing the expenditure necessary for that purpose, and of his having half the benefit of what should be obtained, it was held that such an agreement, whether it amounted strictly in point of law to champerty or maintenance so as to constitute a punishable offence, or not,

(1) 8 Hare, 222; 1 D. M. & G. 660.

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must be considered as against the policy of the law, mischievous, and such as a Court of equity ought to discourage and relieve against.

In *Cockle* v. *Whiting* (1), where the bill was dismissed with costs, the Master of the Rolls said that if the Defendant had established his allegation, that the solicitor of the Plaintiff had guaranteed his client against the expenses of the suit, he would have ordered the solicitor to pay the costs, as it was in fact the suit of the solicitor. So in this case, the suit is to all intents and purposes the suit of the solicitor.

In *Harrington* v. *Long* (2), the Master of the Rolls held that an indemnity against all costs incurred in the prosecution of a suit amounted to maintenance. The cases at law establish the same principle. In *Stanley* v. *Jones* (3), it was held that an agreement to procure evidence in support of a claim upon condition of receiving a portion of the sum recovered was illegal. In *Sprye* v. *Porter* (4), the Court of Queen's Bench held that an agreement to give a portion of the profits derived from property recovered by means of information given for the purpose of the proceedings, amounted to maintenance; and in *Simpson* v. *Lamb* (5), it was held that the purchase of the subject matter of a suit by the attorney was void, as against the policy of the law; and it made no difference that the purchaser was not the attorney on the record. In *Earle* v. *Hopwood* (6), a contract with an attorney to remunerate him for his exertions by a sum commensurate with the benefit resulting to the client, was held to be void on the ground of maintenance.

Then suppose the Court should not dismiss the bill, the question arises, what compensation the Plaintiff would be entitled to. In this case it is evident that the taking of the coal was not fraudulent. The Defendant was unable to ascertain who was the owner of the mines. He was anxious to purchase, but could find no seller. In that state of things he naturally applied to the person who had last sold the surface of the land, and that person being willing to sell him the coal, he purchased it, believing he was justified in

(1) 1 Russ. & My. 43.
(2) 2 My. & K. 590.
(3) 7 Bing. 369.
(4) 7 E. & B. 58.
(5) Ibid. 84.
(6) 9 C. B. (N.S.) 566.

doing so. It was the Plaintiff who was to blame in not coming forward to proclaim himself the owner. But the Plaintiff was, in fact, ignorant of his title, and would have remained so if it had not been for the proceedings set on foot owing to the conduct of the Defendant. The cases as to the method of assessing compensation shew that there is a different principle applied when fraud is proved. In *Martin* v. *Porter* (1), the Court decided that the proper estimate of damages for a trespass of this nature was the value of the coal when gotten, without deducting the expense of getting it; but in that case the Court went upon the supposition that the Defendant had been guilty of fraud in the matter. In *Wood* v. *Morewood* (2), Baron *Parke* told the jury that if there was fraud or negligence on the part of the Defendant, they might give as damages the value of the coals at the time they first became chattels, on the principle laid down in *Martin* v. *Porter;* but if they thought the Defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the field had been purchased from the Plaintiff, and the jury adopted the latter course. *Hood* v. *Easton* (3), does not touch this question, since there was no decision as to the terms upon which compensation was to be given; but the rule laid down in *Wood* v. *Morewood* was acted upon in *Powell* v. *Aiken* (4), so far as it can be applied in this case; and in *Dean* v. *Thwaite* (5), the Court drew a distinction between fraud and inadvertence in taking coals from a neighbouring pit. Then as to compensation for way-leave. It is submitted that this is included in the use of the pit, for the purpose of obtaining coals, and the Plaintiff can have no claim in respect of way-leave.

Mr. *Baily*, in reply:—

There is no ground for alleging that the Plaintiff has been guilty of champerty or maintenance in this case. Mr. *Wright*, who gave the information, though a solicitor is not the Plaintiff's solicitor on the record. As agent to Lord *Kingsdown* he necessarily became

(1) 5 M. & W. 351.
(2) 3 Q. B. 440, n.
(3) 2 Giff. 692.
(4) 4 K. & J. 343.
(5) 21 Beav. 621.

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aware that the Defendant had no title to work the coal, and he communicated the fact to the Plaintiff. It was a just and proper agreement that Mr. *Wright* entered into with the Plaintiff that if he indemnified him against the costs he should receive compensation in a share of the proceeds of the property. Under any circumstances the Plaintiff is entitled to recover, and if this bill were to be dismissed, he could file another upon which he must succeed. The only question, therefore, is, whether the Defendant should pay costs or not. There is no merit shewn on the part of the Defendant why he should escape the ordinary decree for costs. He was not justified in resisting the claim of the Plaintiff, and putting him to the expense of a suit to establish a title which is perfectly clear.

As to compensation for the coal, the Defendant has not proved that he worked them inadvertently. On the contrary, he well knew that Mr. *Dodsley* had no title to give him when he paid £800 for the supposed right to the coal. The market value would have been more than double if there had been any right in the vendor to sell.

The compensation for way-leave must be a subject for inquiry in Chambers. A purchaser of coal has no right to use a pit from which he has taken the minerals for the purpose of bringing up coal from an adjacent mine without paying for the use of such way-leave.

The VICE-CHANCELLOR decided that the Plaintiff had clearly established his title to the mines in question, but reserved his judgment upon the point that was raised as to champerty and maintenance.

June 28. SIR R. MALINS, V.C. :—

At the close of the argument I decided that the Plaintiff had established his title as the son and heir of *James Hilton*, who reserved the mines to himself by the conveyance of March, 1820.

But it was strenuously urged by the counsel for the Defendant that the bargain between the Plaintiff and Mr. *Wright*, under which this suit was instituted, amounted to champerty and main-

tenance, and consequently disqualified the Plaintiff to sue, and that I was therefore bound to dismiss the bill, or to make the Plaintiff pay the costs of the suit, or that I ought not, at all events, to give him any costs.

I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that whenever the right of the Plaintiff, in respect of which he sues, is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that where a Plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise. It is clear that the bargain between the Plaintiff and Mr. *Wright* amounted to maintenance, and if the latter had been the Plaintiff, suing by virtue of a title derived under that contract, it would have been my duty to dismiss his bill. This would have followed from the decisions in *Harrington* v. *Long* (1), *Stanley* v. *Jones* (2), *Reynell* v. *Sprye* (3), *Sprye* v. *Porter* (4), *Simpson* v. *Lamb* (5), and *Earle* v. *Hopwood* (6). I do not refer in detail to those cases, but some of them are cases in which the Plaintiff sues by virtue of a title derived under a contract which amounts to maintenance, and others, as in *Reynell* v. *Sprye*, are bills to set aside the contracts on the ground that they are tainted with that objection.

In this case the Plaintiff comes forward to assert his title to property which was vested in him long before he entered into the improper bargain with Mr. *Wright*, and I cannot, therefore, hold him to be disqualified to sustain the suit.

But as any decree I may make for the Defendant to pay costs would, in effect, go to exonerate Mr. *Wright* from the consequences of the improper contract he has entered into with the Plaintiff, and would to that extent be for his benefit, the decree I shall give the Plaintiff will be without costs. I am the more reconciled to not

(1) 2 My. & K. 590.
(2) 7 Bing. 369.
(3) 8 Hare 222; 1 D. M. & G. 660.
(4) 7 E. & B. 58.
(5) Ibid. 84.
(6) 9 C. B. (N.S.) 566.

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giving the Plaintiff costs, because the neglect of his own rights has placed the Defendant in a position of considerable difficulty :— [His Honour here stated the facts set forth in the Defendant's affidavit as to the manner in which he obtained a conveyance of the coal.] This difficulty would not have arisen if Mr. *Hilton* had known the effect of the deeds which were in his possession. The Plaintiff is, however, entitled to a declaration of his right to the mines in question, and to the injunction which is asked for against the future working of the coal by the Defendant, and to compensation for the value of the coal which has already been worked by the Defendant.

5 Jur (N.S.) 28

There is much difficulty as to the mode of assessing the compensation to an owner of coal which has been improperly worked by the owner of an adjoining mine. It is clear upon the authorities that a different principle is applicable when the coal is taken inadvertently, or, as in the present case, under a *bonâ fide* belief of title, and when it is taken fraudulently, with full knowledge on the part of the taker that he is doing wrong, or, in other words, committing a robbery. In such cases it may be proper to apply the strict rule laid down in *Martin* v. *Porter* (1), which is to charge the value of the coal without allowing any of the expenses of getting it. But in cases where no such ingredients have existed a milder rule has been applied, as in *Morgan* v. *Powell* (2) and *Wood* v. *Morewood.* (3) In the latter case, a rule was adopted by Lord *Wensleydale* which I shall follow on the present occasion. That was an action under circumstances similar to the present, by which the Plaintiff complained that the Defendant had worked from the adjoining pits into the Plaintiff's mines. The circumstances are stated which led to the belief on the part of the Defendant that he was entitled to do so. He had won the coals under the closes *bonâ fide,* supposing that these were his own under a title obtained from another person. On the principle of *Martin* v. *Porter,* the damages would have amounted to between £10,000 and £11,000. Sir *William Follett,* for the Defendant, contended that the jury were the proper judges of damages, and that in that case, where there was no imputation of fraud, or want

(1) 5 M. & W. 351. (2) 3 Q. B. 278.

(3) 3 Q. B. 440, n.

of reasonable care and caution on the part of the Defendant, they might assess the damages on the principle that the Defendant should pay the fair price per acre at which the bed of coal would have been sold to a person who was to be at the expense of getting it. Mr. Baron *Parke* told the jury, that if they found for the Plaintiffs they were to determine what damages should be given; that if there was fraud or negligence on the part of the Defendant, they might give, as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin* v. *Porter* (1); but if they thought that the Defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coal field had been purchased from the Plaintiff. The jury adopted the latter estimate, and found for the Plaintiff damages £210 per acre, which amounted to £2310, instead of £10,000 or £11,000. No motion for a new trial was made. That decision was acquiesced in, and that is the principle which I intend to apply to the present case. Then, applying that principle, the decree will be a declaration that the Plaintiff is entitled to the mines; the injunction, according to the prayer of the bill; an account of what quantity of coals belonging to the Plaintiff have been worked by the Defendant, and what he is entitled to in respect of such coals; but in taking that account, I propose to declare that in estimating the amount to be paid by the Defendant for the coal gotten by him, he is to be paid the fair value of such coal, as if the coal-field had been purchased from the Plaintiff by the Defendant at the fair market value of the district.

There is only one other topic urged, which is, that the Plaintiff is also entitled to compensation for the way-leave, as it was called, that is, a sort of rent for the coal obtained from another property which he has taken through the property of the Plaintiff. I am not very much impressed with that argument, for it is impossible that anybody can say that any damage has been done to the Plaintiff in consequence of the Defendant leading coal. I will not, however, preclude the question, and therefore I will also make that the subject of reference, whether the Plaintiff is

(1) 5 M. & W. 351.

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entitled to any, and what, compensation for the way-leave through his property for the coal got under other property than that of the Defendant. This decree, as I have already said, will be without costs. I ought to add that, in coming to this conclusion, I consider I am acting in perfect conformity with the views of Vice-Chancellor *Wood*, as expressed in *Powell* v. *Aiken* (1).

Solicitor for the Plaintiff: Mr. *Paterson.*

Solicitors for the Defendant: Messrs. *Cunliffe & Beaumont.*

(1) 4 K. & J. 343.

PARFITT *v.* HEMBER.

M. R.
1867
June 7, 27.

Will—Gift in Trust for Devisees for their Lives and their Issue for their Lives for ever—Estate Tail—Cy-près.

Devise in trust for *A.* for life, with remainder in trust for *B.*, *C.*, and *D.*, and the survivor, for their lives and the life of the survivor, and for the issue of them respectively for their lives for ever, as tenants in common, with a gift over on their death without issue, or in case of the death of all their issue; and a direction that the before-stated entails to *B.*, *C.*, and *D.*, and their respective issues, were to be equally divided amongst the daughters as well as the sons of them and their issue:—

Held, that *B.*, *C.*, and *D.* took equitable estates in remainder for their lives and the life of the survivor, with cross-remainders between them, and that, on the death of the survivor, all the children of *B.*, *C.*, and *D.* took equitable estates as tenants in common in tail, with cross-remainders between them in tail.

The doctrine of *cy-près*, established by *Humberston* v. *Humberston* (1), is applicable to such a devise, and not merely to a will of an executory character.

5 Ch D 186
190,

THIS was a suit for the purpose of obtaining the opinion of the Court on the construction of the will of the testator, *Robert Parfitt* the elder. The testator, by his will, dated the 18th of September, 1800, devised to three trustees, and their heirs, certain real estates upon trust to permit his brother, *William Parfitt* the elder, to receive the rents for his life, and, after his death, he directed them to invest the rents until *William Parfitt* the younger, *Robert Parfitt* the younger, and *Elizabeth Parfitt*, the sons and daughter of his said brother, should respectively attain twenty-one, and divide the same as therein mentioned; and as to the disposition of the fee of the said estates after his said nephews and niece should respectively attain twenty-one, he devised the same as follows:—

"Unto my said nephews and niece, and the survivors of them, for their respective lives and the life of the longest liver of them, and to the issue and issues of them respectively for their respective lives for ever, as tenants in common, and not as joint tenants, upon this trust and confidence in my said trustees to permit my said nephews and niece, and the survivors and survivor of them, to enter upon my said real estates, and receive the rents thereof in

(1) 1 P. Wms. 332; 1 Vern 337.

M. R. 1867 PARFITT v. HEMBER.

equal shares (if more than one) for their lives, and the life of the longest liver of them."

But in case any of his nephews or niece should die leaving issue, then the testator directed that the share of his nephews and niece so dying should be held for the use of such issue during minority, and when such issue should attain twenty-one, upon trust to divide the same equally amongst them; and in case all his nephews and niece should die before attaining twenty-one, and without issue, then the estates were to go to the children of *William Pitt* and *Robert Parfeit*, of *Henbury*, on similar trusts; and as concerning the disposition of the fee of his estate and lands, in case his nephews and niece should die without issue, or in case of the extinction and death of all their issue, the testator devised the same to the children of the said *William Pitt* and *Robert Parfeit*, of *Henbury*, as therein mentioned, with a gift over on the death of all of them under twenty-one, and added the following words:—

"And I direct that the before-stated entails to my nephews and niece and their respective issues as aforesaid, and in case of their death and the extinction of their issue as aforesaid to the said *William Pitt* and *Robert Parfeit* and their issue, is intended to be equally divided amongst the daughters as well as the sons of them, my nephews and niece and their issue, or, in case of their death, amongst the daughters as well as sons of the issue of *William Pitt* and *Robert Parfeit*, according to the respective share of his, her, or their parents."

The testator died in 1803. His brother, *William Parfitt* the elder, died in 1809, leaving the testator's two nephews and niece, *William Parfitt* the younger, *Robert Parfitt* the younger, and *Elizabeth Parfitt*, surviving, who all lived to attain the age of twenty-one.

Elizabeth Parfitt (afterwards the wife of *R. Toleman*) died in 1818, leaving one son, who died a bachelor and intestate in April, 1858, and no act was done by him or his mother to bar the estate tail.

In December, 1858, *William Parfitt* the younger executed a disentailing assurance of the share or shares of lands to which he was entitled under the will of the testator, or as his heir-at-law. He died in 1863, leaving six children, who were the present Plaintiffs and having by his will devised his real estates to trustees.

M. R.
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In June, 1863, *Robert Parfitt* the younger executed a disentailing assurance of the share or shares of lands to which he was entitled under the will of the testator. He died in 1865, having by his will devised his real estate to trustees.

The main question for the decision of the Court was, what was the true construction of the devise in the testator's will to his two nephews and niece, and the three following constructions were contended for:—

1. That the two nephews and niece of the testator took equitable estates tail in remainder expectant upon the death of *William Parfitt* the elder, as tenants in common, with cross-remainders between them in tail, which estates became estates in possession on the death of *William Parfitt* the elder.

2. That the said nephews and niece took equitable estates for life as tenants in common in remainder expectant on the death of *William Parfitt* the elder, with cross remainders between them for life, and that all the limitations of the will subsequent to such life estates were void, as tending to a perpetuity.

3. That the said nephews and niece respectively took equitable estates for life in remainder expectant on the death of *William Parfitt* the elder, and with or without cross remainders for life, among them, with remainder to their respective issue, either in tail or for life, and with or without cross remainders between them in tail or for life only.

The third construction was supported by the Plaintiffs; the second by the devisees in trust under the will of *William Parfitt* the younger; and the first by the devisees in trust under the will of *Robert Parfitt* the younger.

Mr. *Chapman Barber*, for the Plaintiffs.

Mr. *Bristowe*, for the devisees in trust under the will of *William Parfitt* the younger.

Mr. *Jolliffe*, for the devisees in trust under the will of *Robert Parfitt* the younger.

Mr. *Chapman Barber*, in reply.

[The following authorities were cited:—*Haddelsey* v. *Adams* (1);

(1) 22 Beav. 266. 2 Jur. N.S. 724

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Seaward v. *Willock* (1); *Blandford* v. *Thackerell* (2); *Humberston* v. *Humberston* (3); *Beard* v. *Westcott* (4); *Somerville* v. *Lethbridge* (5); *Mortimer* v. *West* (6).]

June 27. LORD ROMILLY, M.R.:—

I think that in this will an intention is shewn to give a series of life estates in perpetuity to the issue of the nephews and niece.

If I admitted the contention that the Plaintiffs, as the issue of the nephews and niece of the testator, took equitable estates for life, with cross remainders for life between them, the result would be that, beyond the life estates taken by the issue in existence at the decease of the nephews and niece of the testator, all the subsequent limitations would be void, and the testator would have died intestate as regards them. I think this is a result which ought always, if possible, to be avoided; and I think the doctrine of *cy-près* established by *Humberston* v. *Humberston*, is not a doctrine to be confined to cases where the testator has made a will of an executory character, and has imposed on the Court, or on persons surviving them, the duty of carrying his general intention into effect by framing a settlement for that purpose, but that this doctrine is a rule of construction, and that, when the Court finds that the object expressed by the testator is to give to *A.* an estate for life, to *A.*'s eldest son another estate for life, and to his eldest son a third estate for life, and so on, the Court will carry that intention into effect as nearly as it can, by giving to *A.* an estate for life, and to his eldest son, if unborn at the death of the testator, an estate in tail male, or, if he be alive at the death of the testator, an estate for life, with a remainder to his eldest son in tail male. It is obvious that if no tenant in tail executes a disentailing deed, this accurately effects the intention of the testator from generation after generation. It is true that the law, as incidental to an estate tail, allows any one of the tenants in tail in possession to defeat that intention by disentailing the estate, but this circumstance does not appear to me to affect the reasoning which entitles the

(1) 5 East, 198.
(2) 4 Bro. C. C. 394; 2 Ves. 238.
(3) 1 P. Wms. 332; 2 Vern. 737.
(4) 5 B. & A. 801; T. & R. 25.
(5) 6 T. R. 213.
(6) 2 Sim. 274.

Court to do what, as far as can be allowed, effects the intention of the testator. In the case I have supposed, *A.'s* son or grandson would, if I held that he was only to take a life estate, enjoy the estate for life, and then it would go to the testator's heir-at-law; but if the construction I support applies, he still enjoys the estate for life, and if he does no act to destroy the entail, the estate goes to his son in like manner: but even if he does any act to destroy the entail, the probability is that he resettles the property in a manner more nearly resembling the wishes of the testator than any other construction would admit of.

This seems to me to be the rule of construction adopted in *Vanderplank* v. *King* (1), and also in *Monypenny* v. *Dering* (2). Though this rule of construction may be called technical, still it is a very reasonable one, as it prevents intestacy, and executes the testator's intention as nearly as the law will allow.

I cannot in this case adopt the construction that the nephews and niece took estates tail, as it would be violating the plain words of the testator's will to give the will such a construction. I think that the intentions of the testator, as expressed by the words used by him in his will, are to be thus effected, namely, that the freehold hereditaments devised by his will are given to his two nephews and his niece for their lives and the life of the survivor, not as joint tenants, but what practically amounts to the same thing, with cross remainders for life between them, and that, upon the death of the survivor, the children left by all three form a class who take equitable estates as tenants in common in tail general, with cross remainders between them. As I understand that only one of these three persons left issue that survived the nephew who died last, and that the Plaintiffs are these persons, I am of opinion that the Plaintiffs take under this will equitable estates in tail general as tenants in common; and that as the gift over to the children of *William Pitt* and *Robert Parfeit* is only on the failure of all the issue of the first takers, my opinion is that they take with cross remainders between them in tail.

Solicitors: Messrs. *Meredith, Lucas, & Meredith,* agents for Messrs. *Crossmans & Lloyd, Thornbury.*

(1) 3 Hare, 1. (2) 16 M. & W. 418.

M. R.
1867
June 4.

MACLAREN *v.* STAINTON.

Administration—Claim against Estate of Testator—Compromise—Apportionment between Capital and Income.

A claim made against the estate of a testator was compromised by the payment of a large sum several years after the testator's death:—

Held, that the amount due for principal and interest at the testator's death must be treated as a debt due from his estate, and the *corpus* thereof reduced by that amount; and that any benefit gained to the estate by the compromise must, as between the persons entitled to the *corpus* and income thereof, be apportioned in the ratio of the amount due from the testator at the day of his death, to the further amount calculated to have been due from his estate at the time when the compromise was effected.

THIS suit was for the administration of the estate of *Henry Stainton*, who, by his will, devised and bequeathed his residuary real and personal estate upon trust for sale and conversion; and directed the proceeds to be divided into eight parts, two of which were to be allotted to each of his two sons, one to each of his three daughters then living, and one to the children of a deceased daughter; and the respective shares of his sons and daughters were to be held upon trust for them during their respective lives, and after their deaths for their children.

The testator died on the 5th of December, 1851. He had for a long period acted as agent to the *Carron Company*, and after his decease that company, and the representatives of various shareholders therein, instituted legal proceedings for the purpose of giving effect to certain claims made by them on the estate of the testator, in respect of dealings with the property of the company, and certain shares therein. After the litigation had gone on for some time, and an investigation had been made, on behalf of the persons entitled to the estate, as to the amount likely to be recovered therefrom, agreements were entered into upon the footing of the result of such investigation for the compromise of these claims, and in pursuance thereof large sums (in the case of the *Carron Company* two sums of £220,000 and £104,654 16*s.*) were, with the sanction of the Court, and several years after the death of the testator, paid to the claimants in satisfaction of their claims.

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In the course of certain inquiries which had been directed by an order made in this suit, the question arose how the payment of these sums was to be borne by the testator's estate as between the *corpus* and income thereof; and a summons was taken out by the Plaintiffs, the executors of the testator, for the purpose of obtaining the opinion of the Court on the point. The facts were set out in a statement prepared for the purpose, which, however, contained no account of the calculations upon the basis of which the compromises were effected.

Mr. *Lewin*, for the Plaintiffs, stated the question.

Mr. *Kenyon*, Q.C., and Mr. *F. Lewin*, for the tenants for life of the residuary estate:—

The sums paid in carrying out the compromises were so paid without reference to the amount of principal, interest, and costs; or, at all events, the Court has no means of ascertaining what proportion of these sums was attributed to principal and what proportion to interest. Under these circumstances the whole ought to be paid out of *corpus*. The Court will not enter into a speculation as to how much ought to come out of *corpus*, and how much out of income, any more than upon the occasion of a renewal of a lease by trustees, which is always paid out of *corpus*.

Mr. *Southgate*, Q.C., and Mr. *F. Waller*, for persons entitled to the *corpus*:—

The sums were paid some years after the death of the testator, in satisfaction of a debt due from him. The sums so paid were made up of three items, viz., the principal debt, interest which had accrued due at the testator's death, and interest which had accrued subsequently. The principal and interest due at the testator's death together constituted a debt for which the *corpus* of the estate was liable; and subsequent interest thereon, at the rate of 4 per cent., ought to have been kept down by the tenant for life. The amount due at the testator's death ought to be ascertained by reference to the investigations on which the compromises were effected, and a proportional part of the whole sum paid in carrying out the compromise paid out of the *corpus;* and the rest ought to be borne by the tenant for life.

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Mr. *Appach* (Mr. *Selwyn*, Q.C., with him), for other parties in the same interest.

Mr. *Kenyon*, in reply.

LORD ROMILLY, M.R.:—

I have written down what I think is the principle. Declare that the amount due for principal and interest on any one of the respective sums at the death of the testator is to be treated as a debt due from the estate of the testator, and that the estate must be considered as reduced in capital by that amount at that time; that the amount gained by the Plaintiffs by the compromise must be apportioned in the proportion of the amount due from the testator at the day of his death to the further amount calculated to have been due from his estate at the day of the compromise; and that any sum received by the tenant for life in excess of what he was entitled to on that principle is to be recouped by him, and made good to the estate of the testator. I can, perhaps, make the matter plainer by using figures. Suppose at the death of the testator there was £110,000 due for principal, and £80,000 for interest, that would make £190,000 due at the death of the testator. If it had been paid at that time there would have been a diminution of the estate to that extent, but no arrangement took place for twelve or thirteen years afterwards. In the meantime there was £50,000 additional interest required, so that the claim which might have been made, according to your actuary's notion, was £240,000. Then a compromise is made for £220,000, leaving a profit to the estate of £20,000. That £20,000 profit is to be apportioned between the £190,000 due at the death of the testator and the £50,000 which has subsequently accrued due.

Solicitors: Messrs. *H. & S. R. Lewin*; Messrs. *Dawson, Bryan, & Dawson.*

LOWIS *v.* RUMNEY.

M. R.

1867

July 18.

Debtor and Creditor—Administration—Debt barred by Statute of Limitations—Payment to prejudice of Devisees.

An executor may, in the exercise of his discretion, pay a debt barred by the *Statute of Limitations*, notwithstanding that the personal estate of the testator is insufficient; and he will be allowed the payment as against the devisees of real estate, upon which other debts are in consequence thrown.

JOHN STEPHENSON, by his will, dated the 19th of February, 1859, after appointing the Plaintiffs, *Michael Lowis* and *Christopher Simpson*, executors, devised all his real estate to them, their heirs and assigns, upon trust to sell the same within one year after the death of the testator's sister, *Elizabeth Rumney*, or her husband, *William Rumney*, or the survivor of them; and to divide the proceeds equally between his three nieces and his nephew therein named; and in case any of them should die in the lifetime of *Elizabeth* or *William Rumney*, his or her share was to be paid to the survivors or survivor of them. He also gave and bequeathed to his executors, upon trust, all his stock, crop, and implements of husbandry, and the residue of his personal estate and effects, subject to the payment of his just debts, funeral and testamentary expenses; but it was his express will that his sister, *Elizabeth Rumney*, and her husband, *William Rumney*, should enjoy and have for their own use all rents and profits arising from his real and personal estate during the term of their natural lives.

The testator and *Elizabeth Rumney* both died in 1859; *William Rumney* was still living.

The testator's personal estate proved insufficient for the payment of his debts, and this suit was instituted in 1866 for the administration of his real estate. The ordinary decree was made; and by his certificate the Chief Clerk found, amongst other things, that the Plaintiffs were entitled to be allowed in their accounts the sum of £140, paid by them on the 27th of August, 1861, in satisfaction of a promissory note of the testator, which bore date the 18th of May, 1850, and was barred by the *Statute of Limitations*. The nephew and two of the nieces of the testator named in

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his will took out a summons to vary the certificate by disallowing this item. It was admitted that the real estate would be sufficient for payment of all the debts.

Mr. *Baggallay*, Q.C., and Mr. *Tripp*, in support of the summons:—

The executors have paid a debt barred by the *Statute of Limitations*, without any resistance, and have thus thrown the debt on the real estate. An executor may pay such a debt out of pure personal estate; but he does not in any way represent the real estate of a testator; and for the benefit of the real estate it is his duty to plead the statute as a defence to such a claim. The creditors can only get their debts paid by means of a suit in this Court, there being no charge of debts on the real estate by the will. If the executor were now seeking to pay the debts, the residuary devisees might interfere, and compel the defence to be set up; why should they be prejudiced by his prior acts? [They referred to *Hill* v. *Walker* (1); *McCulloch* v. *Dawes* (2).]

Mr. *C. J. Shebbeare*, for the executors; and

Mr. *H. F. Shebbeare*, for other parties.

LORD ROMILLY, M.R.:—

I think it is much to be regretted that the statute did not destroy the debt instead of merely taking away the remedy for it. The result is, that questions constantly arise, and amongst others, whether an executor may not pay a debt barred by lapse of time. I am of opinion that, in the exercise of his discretion, he may do so, and that it does not make the slightest difference whether the personal estate is sufficient or insufficient. If it be insufficient, the statute gives the creditor a remedy against the real estate; but that does not interfere with the discretion of the executor.

The summons must be dismissed.

Solicitors: Messrs. *Gray, Johnston, & Mounsey*; Mr. *J. Trail.*

(1) 4 K. & J. 166. (2) 9 D. & R. 40.

In re BREECH-LOADING ARMOURY COMPANY.
In re MERCHANTS' COMPANY.

M. R.
1867
July 11, 18.

Companies Act, 1862, *s.* 115—*Examination—Attendance of Counsel and Solicitor—Re-examination—Notes of Proceedings.*

Where a person is examined at the instance of the official liquidator under s 115 of the *Companies Act*, 1862, his counsel and solicitor are entitled to be present at the examination, to examine the deponent when the examination on behalf of the official liquidator is concluded, and to take notes of the proceedings.

July 11. *In re* BREECH-LOADING ARMOURY COMPANY.

THIS was an application by the official liquidator of the *Breech-loading Armoury Company*, now in course of being wound up, that Mr. *Henry Calisher* should attend, at his own expense, before the Special Examiner, and answer such questions as were properly put to him.

Mr. *Calisher* was alleged to be a contributory, and was summoned by the official liquidator to appear before the Examiner, and be examined with respect to the affairs of the company, under the 115th section of the *Companies Act*, 1862. In obedience to the summons he attended before the Examiner, accompanied by his solicitor. After he had been duly sworn the counsel for the official liquidator desired the solicitor to leave the room, which the solicitor declined to do: and thereupon the examination was adjourned in order that his right to remain might be determined by the Court.

Mr. *Selwyn*, Q.C., and Mr. *Swanston*, for the official liquidator:—

The present application raises two questions. First, whether a person being examined under sect. 115 of the *Companies Act*, is entitled to be attended by his counsel or solicitor. We contend that he is not. The section is analogous to similar provisions under the Bankruptcy Acts; and under those the counsel or solicitor of the deponent is never allowed to attend. The object of the examination is to obtain information which may be useful

M. R. 1867 *In re* Breech-Loading Armoury Co.

to the official liquidator, but is not evidence, and cannot be used against the deponent or any one else. But even if it could be so used, still no one ever heard of counsel appearing for a witness at *nisi prius*. In a cause the deposition of a witness may be taken *ex parte*, and then no counsel for the witness is ever present. Another question raised is, whether the chambers of a Special Examiner are a public or private Court. The Examiners in the Court of Chancery have a power to order all persons to leave their offices: *à fortiori* a Special Examiner can do the same.

Mr. *Jessel*, Q.C., and Mr. *Cottrell*, for Mr. *Calisher*, were not called upon,

Lord Romilly, M.R.:—

It is impossible to say that the examination of Mr. *Calisher* can never be used against him. Could he not be tried for perjury? Could not you ask him, upon his being examined afterwards with reference to the same matters, "Did not you say so and so before the Examiner?"

Independently of this, many persons, whose evidence is entirely trustworthy, become extremely embarrassed upon cross-examination. It is to be remembered that this is an adverse, or, at all events, an unwilling witness. What reliance could the Court place on the evidence of an unfortunate man shut up in a room with the Examiner and hostile counsel without any one to protect him?

The witness is entitled to the same protection which, except in the case of a mere *ex parte* witness, he would have if he were examined before one of the Examiners of the Court, or the Court itself. He must attend and be examined, but he is entitled to be attended by his counsel and solicitor.

July 18. *In re* MERCHANTS' COMPANY.

THIS was a summons by the official liquidator of the *Merchants' Company, Limited*, that Mr. *Horace Edward Chapman* might be ordered to attend, at his own expense, before the Examiner, and

submit to be examined on behalf of the liquidator concerning the dealings, estate, and effects of the company, and to answer all such questions as should be properly put to him, and to pay the costs of the application: and that it might be part of the order that no counsel, solicitor, or other person, should be at liberty to attend such examination on behalf of the said *Horace Edward Chapman*, or on behalf of any other person except the liquidator; and that no notes of the examination be taken either by the said *Horace Edward Chapman*, or any other person, except by or on behalf of the liquidator.

Mr. *Baggallay*, Q.C., and Mr. *Lindley*, for the official liquidator:—

The object of the present summons is to obtain the decision of the Court in reference to three points of practice, which have arisen in examining persons under sect. 115 of the *Companies Act*, 1862. First, whether such persons have a right to the presence and assistance of their counsel and solicitors at the examination. Second, assuming the first point to be determined in their favour, whether such counsel and solicitors are entitled to take an active part in the examination, by re-examining their clients after they have been examined on behalf of the official liquidator. Third, whether such counsel and solicitors are entitled to take notes, or have a copy of the proceedings.

On the first point we submit that the practice ought to be the same in winding-up cases as in bankruptcy. The 105th section of the *Companies Act*, 1862, is a copy of a clause which has been in all the Bankruptcy Acts since the time of *George* II. Under these Lord *Hardwicke* declined to make an order that the person summoned for examination might be attended by counsel: *Ex parte Parsons* (1). At common law it has been repeatedly held that no person has any *locus standi* as counsel for a witness. But as we understand that your Lordship has already decided the point in the case of the *Breech-loading Armoury Company*, we press the argument no farther.

On the second point we submit that if the counsel and solicitors of a deponent are to be present at his examination, their duty

(1) 1 Atk. 204.

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must be confined to giving him advice as to his answers, and that they have no right to re-examine him after he has been examined on behalf of the official liquidator.

As to the third point, the object of the examination is to get at the truth with respect to the formation and dealings of the company. Now if the counsel and solicitors of one deponent are allowed to take notes of his examination, these notes will be shewn to other persons who are summoned before the Examiner: and they are thus enabled to prepare themselves beforehand, and to defeat the object of the examination. The analogy of the practice in bankruptcy ought to be followed. In *Boden* v. *Dellow* (1), the Lord Chancellor would not allow bankrupts against whom a bill had been filed to look at their depositions before putting in their answers. In *Bracy's Case* (2), it was held that depositions in bankruptcy are of a private nature, and the Court would not allow the deponent to have a copy. In *Ex parte Bland* (3), the Lord Chancellor would not restrain the Commissioners in Bankruptcy from examining the bankrupt, so as to allow him time to prepare himself.

Mr. *Jessel*, Q.C., and Mr. *Winterbotham*, for Mr. *Chapman*, were not called upon.

LORD ROMILLY, M.R.:—

The examination must be conducted in the same way as in ordinary cases. I do not consider that the cases on the practice in bankruptcy have any analogy at all. In those the Lord Chancellor issued a commission to certain persons, generally five in number, to inquire into the affairs of a bankrupt. Those persons were judges whom he appointed for that purpose; and the Court, having always control over them, allowed them to conduct that examination in such a manner as they thought most conducive to eliciting the truth. If, in the course of the proceedings, any information was obtained which enabled other parties to bring an action, or to institute a suit, then the rules relating to an action, or to a suit, had to be followed, and evidence had to be brought forward in the ordinary manner. It is true that use might be

(1) 1 Atk. 289 (2) 1 Raym. 153. (3) 1 Atk. 205.

made of the evidence given before the Commissioners; because when a man was under cross-examination he might be asked, "did not you say so and so before the Commissioners?" and this might be treated as the admission of the witness. A winding-up case has no sort of analogy to that. The official liquidator is not the judge; the Special Examiner is not the judge. The Court is the judge; the Court alone does anything in relation to those matters.

If the official liquidator chooses himself, or obtains leave from the Court, to institute a suit against these persons, he must proceed in the ordinary and regular manner. He can, if he pleases, examine a witness *ex parte* on his own behalf before an Examiner without any person being present, subject to this, that when the matter comes into Court, the witness will be liable to be cross-examined by the other side as they think fit. But to take a witness and shut him up in a room with the Special Examiner, surrounded by counsel and solicitors for the official liquidator without any protection on his own side whatever, and examine him (knowing him to be a hostile witness) as the liquidator may think fit, and then seal up all that evidence, and not allow him a copy, or let him know anything at all about it, and afterwards found proceedings upon it which may, possibly, affect him very seriously, is a matter which appears to me a violation of the first principles of justice, and one which I should be the last person to sanction, and therefore the application for that purpose must be refused.

Solicitor for the Official Liquidator of the *Breech-Loading Armoury Company:* Mr. *T. E. Harper.*

Solicitors for Mr. *Calisher:* Messrs. *G., S., & H. Brandon.*

Solicitor for the Official Liquidator of the *Merchants' Company:* Mr. *J. R. Bailey.*

Solicitors for Mr. *Chapman:* Messrs. *Mackenzie, Treherne, & Trinder.*

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1867
July 4, 11.

In re BARNED'S BANKING COMPANY.

ANDREWS' CASE.

Winding-up—Contributories—Liability of past Members—Marshalling as between past and present Members—Companies Act, 1862, *s.* 38.

The principles on which, under s. 38 of the *Companies Act*, 1862, the liability of the transferors of shares in a limited company within a year of the commencement of the winding-up is to be ascertained and enforced, and the mode in which the amount for which such transferors may be liable is to be applied in payment of the debts of the companies, considered.

THIS was an application by the official liquidator of *Barned's Banking Company, Limited*, to place the name of Mr. *Andrews* on the list of contributories of the company in "Class B." of the company, he being a transferor of shares within a year of the winding up of the company to a shareholder whose name was on the register at the time of the winding-up order.

The order for winding up the company, which was a limited company, formed under the *Companies Act*, 1862, was made within a year of its formation, and the existing members were unable to meet the liabilities. The questions that were raised in the case involved the general mode in which the liability of the several classes of past members of the company who had transferred their shares was to be ascertained, having regard to the 38th section of the *Companies Act*, 1862 (1), and further, how the

(1) The 38th section of the *Companies Act*, 1862, is as follows: "In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following, that is to say:—

1. "No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up.

2. "No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member.

3. "No past member shall be liable to contribute to the assets of the company, unless it appears to the Court that the existing members are unable to

money to be received from such transferors was to be applied in discharge of the debts of the company.

Mr. *Selwyn*, Q.C., and Mr. *Kekewich*, for the official liquidator.

Mr. *Locock Webb*, for transferors of 6000 shares.

Mr. *Little*, Q.C., and Mr. *Bardswell*, for creditors of the company.

Mr. *Jessel*, Q.C., and Mr. *North*, for Mr. *Andrews*.

July 11. LORD ROMILLY, M.R. :—

The question in this case, which is one of some nicety, is what is the time at which, and the mode in which, the different classes of contributories of a company which is being wound up are to be ascertained, and what is the amount of their liability and the mode in which it is to be applied. It is difficult in determining this case not to avoid making observations which are in the nature of *obiter dicta*, and not necessarily called for. As far as I know this is the first case I have had on the subject.

The first question is, when the class is to be ascertained. To avoid obscurity (according to the ordinary mode, which, however, is not strictly accurate) I call Class A. the members at the time when the company is wound up; Class B. the transferors of those shares to such members within the year; Class C. the transferors to Class B., also within the year, and so on to any previous class.

The 38th section of the *Companies Act*, 1862, lays down distinctly the general rules by which the liability is to be ascertained.

The first question is, when class B. is to be ascertained. I am of opinion that it is first to be ascertained that Class A. will be unable to pay. If Class A. had paid up the full amount of the shares the question would not arise. Thus, if they were all £50 shares, and every shareholder had paid up the whole amount of the £50, Class B. could not be called upon, because they could only be called upon for the deficiency on the shares. But when that is not the

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satisfy the contributions required to be made by them in pursuance of this Act.

4. "In the case of a company limited by shares, no contributions shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member."

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case, Class B. will be called upon, but only for the amount which remains due on their shares.

With respect to the second *placitum* of the 38th section, I am of opinion that when a call is made on Class A., the money derived from them is to be paid *pari passu* among all the creditors as far as it will extend, without any selection or preference of one creditor over another. If they are not paid in full, then Class B., that is, the transferors to Class A. within the year, become liable. Supposing there were 100 shares (for I cannot make this distinct without a few figures), and that the holders of shares from number 1 to 10 had paid up in full, no transferor of any of those shares would be liable. Then, suppose that the shares from number 11 to 100 had not been paid up in full, the consequence would be that the transferors of those shares within the year would be liable to contribute. But, supposing that this peculiarity were to occur with respect to those shares, that half of them had half paid up, and the other half have had only a quarter paid up, the consequence would be, that you must resort first to the transferors of those shares which had only had one quarter paid up, in order to equalize them with the others. That would be the course provided that by so doing sufficient would be raised to pay the debts in full; but if not, then all must be called on to pay the full amount, and it would be unnecessary to postpone a call on any of the shares if it should appear that 75 per cent. would be necessary in one case, as well as 50 per cent. in the other, because the whole must be called up, and no one can get rid of his liability to pay up his shares in full by reason of other shares not having been paid in full, through the inability of the transferors and transferees to make good the amount required.

Then the question arises how the money is to be applied. I am of opinion that it is to be applied in payment of the debts rateably, subject to this qualification: It is stated in pl. 2 of the 38th section, that "no past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member." Assuming that half the debts were contracted after he ceased to be a member, and the other half during the time he was a member, or previously to his becoming a member,—the consequence would be, that I should marshal the

payment, and apply the payment from his shares to the debts that were incurred during the time he was a member, and apply the moneys derived subsequently in payment of the subsequent debts, so that practically it would rarely be necessary to do more than to divide the money equally among all the creditors.

With regard to Class C., the same rules would apply.

In the case of *Barned's Banking Company*, Class A. will not be able to pay the debts, and as the company was only established within a year from the winding-up order, all the other shareholders will be liable to pay, but I shall make the call in the way I have stated, and then, instead of declaring an account of what the indebtedness of the company was at the time when I made the call, I shall marshal the call so as to make the amount paid by the transferors available in payment of those debts for which they were liable at the time they transferred their shares, and leave the other moneys for the payment of the other creditors, so as to get the largest amount possible.

To make this clear, I will assume that when Class B. transferred their shares there were debts to the amount of £1000 still due from the company; they would be liable to pay that amount. Assume that there were £1000 of debts contracted since that period remaining unpaid, and that there were creditors who had a right to go against Class B., I should direct the debts to be paid in such a way as to enable them to throw the whole of their debts on Class B., so that the other creditors might, if possible, be paid in full, but if that case should arise I should wish the point to be argued.

In the event of any arrangement being made between the official liquidator and the shareholders in Class A., I am of opinion that Class B. need not be served, but at the same time I should give to them, or any other class, every facility for examining into the fitness or unfitness of such compromise, and I should hear any representation they might make on the subject.

The case will be adjourned into Chambers, that Class B., which includes all transferors within the year, may be ascertained.

Solicitors for the Official Liquidator: Messrs. *Freshfields.*
Solicitors for the Transferors: Messrs. *Tilleard & Co.*
Solicitors for the Creditors: Messrs. *Cunliffe & Beaumont.*
Solicitor for Mr. *Andrews*: Mr. *W. W. Wynne.*

M. R.
1867
July 9.

LISTER *v.* TIDD.

Fund in Court—Mortgage—Stop Order—Priority.

A person being entitled to an undivided share of a fund in Court, mortgaged it to *A.*, who obtained a stop order on the fund. An order was subsequently made for the distribution of the fund, and the share of the mortgagor was carried over to the account of him and his incumbrancers. *B.*, a mortgagee subsequent in time to *A.*, then obtained a stop order on the fund so carried over to a separate account :—

Held, that *B.* did not thereby gain priority over *A.*

GABRIEL LISTER, being entitled to one-fourth part of a fund in Court, representing the residuary estate of the testator in the cause, mortgaged the same to one *Crossing*, on the 28th of July, 1862. In 1864 he mortgaged the same fund to Messrs. *Hooke & Street*, his solicitors. On the 15th of April, 1867, *Crossing* obtained a stop order on the fund.

On the 6th of May, 1867, an order was made for the distribution of the fund, notwithstanding the order of the 15th of April; and the share of *Gabriel Lister* was directed to be carried over to the account of him and his incumbrancers, with liberty to any persons interested to apply to the Judge in Chambers respecting the same.

On the 15th of May, 1867, Messrs. *Hooke & Street*, who had not obtained any stop order on the undivided fund, obtained a stop order on the fund so carried over to a separate account.

Subsequently *Crossing* took out a summons for the payment to him of the fund standing to the separate account; and this summons was now adjourned into Court.

Mr. *Selwyn*, Q.C., and Mr. *J. H. Taylor*, for *Crossing* :—

Crossing has the first charge on the fund in point of time; and he obtained the first stop order. He thus was, on the 6th of May, clearly prior to Messrs. *Hooke & Street*, and the order of that date was not intended to alter the priority of the incumbrancers.

Mr. *Baggallay*, Q.C., and Mr. *Dauney*, for Messrs. *Hooke & Street* :—

The Court will not go behind the present account, and will give the fund to the holder of the only stop order thereon. If the

(1 Ves. Sr. C. 157 R.; 17 Ves. 548.)

holder of the former stop order had wished to retain his priority he should have obtained a direction for continuing the order, but as the matter now stands that stop order has fulfilled its purpose; for the fund was not distributed without notice to the person who obtained it.

[It was also argued that the fund in question was not comprised in *Crossing's* security; but it is not necessary to report the argument on this point.]

LORD ROMILLY, M.R., after deciding that the fund in question was comprised in *Crossing's* security, continued:—

The other point opens a question of considerable nicety, and one which is apparently novel; at all events, no cases have been cited to me, and I presume there are none. It appears that a share of an undivided fund in Court was mortgaged and the mortgagee obtained a stop order on the fund. That stopped the division of the whole fund without notice to him. In May, 1867, an order was made for the distribution of the fund, notwithstanding the stop order; and the share of the mortgagor was carried over to the account of him and his incumbrancers, and thereupon the second mortgagee obtains a stop order on the share so carried over. Does he thereby obtain priority over the first mortgagee? I think not. Suppose that the mortgagor had been satisfied that nothing could ever come to him, and had requested his name to be left out, and that the fund had been carried over to the account of the incumbrancers alone, and an inquiry had been ordered as to their priority. Could one of the incumbrancers get priority over the others by taking out a stop order? I apprehend not. There is no authority for such a proposition; and it seems to be contrary to principle, for the Court would hold the fund as a trustee for the persons entitled thereto in order of their priorities. Therefore I think this fund must be paid to Mr. *Crossing*: but at the same time there is no doubt that where a fund is carried to the account of a particular person alone, the incumbrancer who gets the first stop order on it thereby gains priority.

Solicitor: Mr. *Fluker*, agent for Messrs. *Sole & Gill, Devonport;* Messrs. *Hooke & Street.*

M. R.
1867
July 2, 3.

In re BROWN, A SOLICITOR.

Solicitor and Client—Trustee and Cestui que Trust—Costs—Taxation—6 & 7 *Vict. c.* 73, *s.* 38.

The rule that the taxation of a bill under the third party clause (6 & 7 Vict. c. 73, s. 38) is as between solicitor and client, is subject to this limitation, that a solicitor cannot charge against a trust estate anything not necessary for the administration thereof, though expressly directed by the trustee; but must look for payment of such charges to the trustee personally.

THIS was an application to review the taxation of a bill of costs. It appeared that Mr. *Brown* had acted as solicitor for a trustee under a will. Upon the trust estate being got in and distributed, he delivered his bill of costs, and received payment from the trustee.

Subsequently one of the *cestuis que trust* obtained an order for the taxation of the bill, and thereupon the Taxing Master disallowed a considerable number of items, and, in particular, charges for certain attendances upon the trustee, and for letters written to him, or to third parties by his direction. The object of the application was to obtain the allowance of these items.

Mr. *Little*, Q.C. (Mr. *W. Pearson* with him), in support of the application:—

The bill has been taxed under sect. 38 of the *Attorneys and Solicitors Act* (6 & 7 Vict. c. 73), and it has been repeatedly held that under that section the *cestui que trust* stands in the place of the trustees, and that the taxation must be as between solicitor and client: *In re Neate* (1); *Re Baker* (2); *Re Davison and Torrens* (3). It is quite clear that upon this principle all the items in question ought to be allowed, as between the *cestui que trust* and the solicitor. There is no charge here that the trustee and solicitor colluded for the purpose of creating costs.

If it was improper in the trustee to require the solicitor to write so many letters, or to attend upon him so often, the remedy of

(1) 10 Beav. 181. (2) 32 Beav. 526.
(3) 17 Ir. Ch. Rep. 7.

the *cestui que trust* is to object to the allowance of the items in the account between the trustee and himself.

Mr. *Selwyn*, Q.C., and Mr. *Rowcliffe*, *contrà*, were not called upon.

July 3. LORD ROMILLY, M.R.:—

I assent to what Mr. *Little* said, that, under the third party clause, the person who taxes the solicitor's bill must tax it exactly as if he stood in the place of the trustee, and that, therefore, it is a taxation between solicitor and client; but with the following qualification. If a person, being a trustee, chooses to employ a solicitor for the purpose of conducting the affairs of the trust, which, of course, the solicitor is well aware of, there is a distinction between his employing that same solicitor for exactly similar purposes with regard to which he is not a trustee. Suppose, for instance, that he is not a trustee, but simply a client, and that he says to the solicitor, "I wish you would make me, or procure for me, copies of such and such deeds, and I want to have them fully explained to me, and I come to you for that purpose." The solicitor tells him, "You can have them if you wish, but they are not at all wanted, they are of no species of use." The client says "Never mind, I require it to be done." The solicitor says, "If you wish it, you shall have it." When the bill is taxed, and that fact is stated, the client cannot complain. He would be told, "You ordered it to be done, you were told it was useless, and you must pay for it." But take the case where he is a trustee. He makes the same request, the solicitor makes him the same answer, on which the client says, "Never mind, I still insist upon that being done." Then it is the duty of the solicitor to tell him, "Very well, if you insist on its being done, it shall be done; but you must understand that as this is not required for the purposes of the administration of the trust, you cannot charge these costs against your *cestui que trust*, and I cannot put them into the bill of costs which will have to be paid out of the trust estate; therefore, if you require it to be done, you must pay for it personally, and you will understand that it is a personal matter between you and me." And Mr. *Little* very properly admitted, if the circumstances

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amounted to something like collusion between them, there could be no question upon the subject.

I think, therefore, that it is the duty of the solicitor to tell the trustee, "This is not wanted for the administration of the trust, and if you insist upon its being done, it is for your private convenience, and, therefore, cannot be charged against the trust estate."

So regarding it, I have looked at this bill, and I have no doubt that the client did order it all, but then the application of the rule I have mentioned appears to me to be necessary, and then comes this question, which is properly a question for the Taxing Master to determine, is it proper, or necessary, or fit, for the administration of the trust that certain things should be done?

Now, on a question of *quantum* the Court always allows the opinion of the Taxing Master to be paramount and follows it, and this rule really applies not merely to a question of *quantum*, but, if I may go on with the same sort of illustration, to a question of *quoties*. For instance, it is a question of *quantum* whether you shall allow 13*s.* 4*d.* or 6*s.* 8*d.* for an interview; it is a question of *quoties* whether you shall allow ten or twelve interviews. On those matters the Taxing Master is best capable to form a judgment, and he always goes through these matters very carefully. I am of opinion that I cannot alter any of the taxation of the Taxing Master. I must refuse this summons, and, although I regret it, with costs.

Solicitors: Messrs. *Skilbeck & Griffith*, agents for Messrs. *Wilson & Brown, Manchester;* Messrs. *Gregory, Rowcliffes, & Rawle.*

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1867

July 10.

Direction to invest Surplus—Accumulations—Thelluson Act (39 & 40 *Geo.* 3, *c.* 98).

Direction that trustees should apply so much as necessary of the income of testator's residuary personal estate for the maintenance of his son (a lunatic) for life, and upon further trust to invest any surplus, and to treat it as part of testator's personal estate, which was given over after the son's death:—

Held, that the direction to invest the surplus was void beyond the period of twenty-one years from the testator's death, and that testator's next of kin were entitled to the accumulations.

But, *semble*, accumulations arising by operation of law are not within the *Thelluson Act*.

Countess of Bective v. *Hodgson* (1) observed on.

Testator having charged the share of a residuary legatee with money due on the security of bonds, and all interest thereon:—

Held, that nothing beyond the penalty was to be deducted from the share.

JONATHAN SORSBIE, by his will, dated the 9th of November, 1816, gave to *W. Clark*, *B. Sorsbie*, and *R.* and *W. Makepeace*, all his freehold property, to the use of them, the said devisees, during the life of his son, *Jonathan James Sorsbie*, upon trust during his son's life to manage the same, and to apply the whole rents, deducting taxes and repairs, towards the maintenance and support of his said son for life, and, after his decease, then to the use of the first, second, third, fourth, and all and every son successively and in remainder, as they should be in seniority of age; and in default of such issue, to the use of the daughters of his said son. After bequeathing certain legacies and annuities, as to the rest and residue of his personal estate, subject to the said legacies and annuities, he gave and bequeathed the same to *William Clark* and *B. Sorsbie*, upon trust to convert the same into money, and to lay out and invest the same in government or real securities, at their or his discretion, and stand possessed of the same respectively, upon trust to apply the interest, dividends, and proceeds, or as much of them as might be necessary, for and towards the maintenance and support of his son, *Jonathan James Sorsbie*, during the term of his natural life, and for supplying him with every comfort and con-

(1) 10 H. L. C. 656.

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venience which his situation might require; and upon further trust to lay out and invest in the public funds, or upon real security, any surplus which might from time to time remain of and from the said interest, dividends, and proceeds, after such application as aforesaid; and to treat and consider such surplus in all respects as part of the testator's personal estate and effects. In the event of the death of his son without issue he gave over his real and personal estate, one moiety thereof being given to *Benjamin Sorsbie.*

By a codicil to his will, dated the 27th of January, 1821, he substituted *Francis Mascall* as trustee and executor for *Benjamin Sorsbie,* but revoked his will in no other respect, and then he proceeded as follows:—

And further, the said testator thereby declared that the several debts or sums of money due and owing to him from the said *Benjamin Sorsbie,* and mentioned in the respective codicils to his said will, as well as any other debt or debts, sum or sums of money, which should be due or owing to him from the said *Benjamin Sorsbie* at the time of his decease, should not, nor should any of them, be required under any circumstances to be paid, or considered as due or payable, by the said *Benjamin Sorsbie,* his heirs, executors, or administrators, unless and until the contingent share, estate, and interest in his, the said testator's, real and personal estate given to the said *Benjamin Sorsbie,* his heirs, executors, and administrators, by his said will, should become a vested estate and interest by the death of his, the said testator's, said son, *Jonathan James Sorsbie,* without issue, as in the said will is mentioned; and that upon the happening of that event the said debts and sums of money then due to the said testator or his executors from the said *Benjamin Sorsbie,* his heirs, executors, or administrators, and all interest thereon, should be a charge upon and deducted from the shares of him, the said *Benjamin Sorsbie,* his heirs, executors, or administrators, of and in the said testator's real and personal estate and effects, so given to the said *Benjamin Sorsbie* by the said will. And the said testator thereby directed that the said *Benjamin Sorsbie,* his heirs, executors, or administrators, should in the meantime pay legal interest upon all the said debts or sums of money half-yearly.

He died on the 9th of December, 1821, without having otherwise revoked his will, which was duly proved.

The testator left *J. J. Sorsbie* him surviving, who at his death was of weak intellect, and was found lunatic by an inquisition, in 1822. *William Clark* was appointed his committee, and on his death the Defendant *Keble* was appointed committee, and an annual sum of £525 allowed for the maintenance of the lunatic, which did not exhaust the income.

On the 9th of December, 1842, being twenty-one years after the testator's death, the residuary personal estate had accumulated from £11,986 9*s.* 2*d.*, the amount at the testator's death, to £31,200 consols, and at the death of the lunatic, on the 4th of July, 1864, to £56,800.

Benjamin Sorsbie had given to the testator three bonds, one dated the 31st of August, 1819, in a penal sum of £4200, to secure £2100, with interest at £5 per cent.; a second, dated the 1st of January, 1821, in a penal sum to secure £1468; and a third bond, dated the 31st of January, 1821, in a penal sum of £8000, subject to a condition for making void the same if *Benjamin Sorsbie* should pay the full sum of £4000, with legal interest for the same, within three months next after *Benjamin Sorsbie* should take an absolute interest in one moiety of the clear residue of the personal estate of *Jonathan Sorsbie* under his will, dated the 9th of November, 1816.

Benjamin Sorsbie paid interest on the two bonds first mentioned till 1836, but had failed to pay subsequent interest. On the last-mentioned bond he never paid interest. On the 7th of November, 1864, this bill was filed to administer the testator's estate, and on the 18th of February, 1865, an administration decree was made, directing certain inquiries. By his certificate, the Chief Clerk found, *inter alia*, that there was due for principal and interest from *Benjamin Sorsbie* upon the said bonds, up to the 18th of February, 1865, the sum of £21,328 15*s.* 5*d.*

Two points were raised on further consideration; first, whether the direction to invest the surplus was a direction to accumulate, void beyond the period prescribed by the *Thelluson Act;* and, secondly, whether *Benjamin Sorsbie* ought to be charged with interest beyond the amount of the penalty of the bond.

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MATHEWS v. KEBLE.

Mr. *Bazalgette*, Q.C., for the trustees.

Mr. *Bacon*, Q.C., and Mr. *Leonard Field*, for the assignees of *Benjamin Sorsbie* :—

The question raised on the first point is, whether, under the *Thelluson Act*, the direction to invest the surplus is invalid beyond the twenty-one years from the testator's death. In this will the word "accumulate" does not occur at all. In the case of *Griffiths* v. *Vere* (1) Lord *Eldon* laid it down distinctly that where an accumulation arises, not from a direction in the will, but by operation of law, it is not within the meaning of the Act. In *Elborne* v. *Goode* (2), and *Lombe* v. *Stoughton* (3), the late Vice-Chancellor of *England* expressed the same opinion, and decided the point in the case of *The Corporation of Bridgnorth* v. *Collins* (4). There might well be a case in which, though not within this statute, the direction might violate the rule against perpetuities, or be objectionable on other grounds; but that is not this case, for it is admitted that unless within the *Thelluson Act* the direction to invest is free from objection.

[They also cited *McDonald* v. *Bryce* (5); *Wilson* v. *Wilson* (6); *Coombe* v. *Hughes* (7); *Evans* v. *Hellier* (8); *Shaw* v. *Rhodes* (9); On the question of the amount of interest due on the bonds, they relied on the *Statute of Limitations*; and, secondly, that the amount due was limited to the penalty of the bond. They cited *Grant* v. *Grant* (10); *Campbell* v. *Graham* (11); *Clarke* v. *Lord Abingdon* (12).]

Mr. *Greene*, Q.C., and Mr. *Horace Davey*, for the next of kin :—

It is not necessary that the will should contain a direction to accumulate if an accumulation takes place necessarily by reason of the form in which the property is given: the case, therefore, clearly falls within the first section: *Tench* v. *Cheese* (13).

(1) 9 Ves. 127.
(2) 14 Sim. 165.
(3) 12 Ibid. 304.
(4) 15 Ibid. 538.
(5) 2 Keen, 276.
(6) 1 Sim. (N.S.) 288.
(7) 34 Beav. 127.
(8) 5 Cl. & F. 114.
(9) 1 My. & Cr. 135.
(10) 3 Russ. 598.
(11) 1 Russ. & My. 453.
(12) 17 Ves. 106.
(13) 6 D. M. & G. 453.

In *Edwards* v. *Tuck* (1); *Wildes* v. *Davies* (2); *Burt* v. *Sturt* (3); *Bourne* v. *Buckton* (4); *Jones* v. *Maggs* (5); the Court held that accumulations similar in principle were invalid, and were not protected by the 2nd section of the Act. In the more recent case of *Drewett* v. *Pollard* (6) the Master of the Rolls took the same view. It is quite clear that the trustees were bound by the will to invest every part of the fund except what was actually required for the son's maintenance: *Twopeny* v. *Peyton* (7).

[*Countess of Bective* v. *Hodgson* (8), and *O'Neil* v. *Lucas* (9), were also cited.]

Mr. *J. H. Palmer*, Q.C., and Mr. *Smart*, for *Robert Sorsbie*.

Mr. *Townsend*, for *Keble*.

Mr. *Bacon*, in reply:—

In *Bryan* v. *Collins* (10) it was held that an accumulation for more than twenty-one years may take place.

SIR JOHN STUART, V.C.:—

The first question is, as to the effect of the trust which directs an investment of the surplus income of the testator's estate. The *Thelluson Act* provides that where, in a will or deed, there is a direction disposing of property in such a manner that the rents shall be wholly or partially accumulated, that direction shall be void so far as the accumulation exceeds the period of twenty-one years from the death of the testator, settlor, or devisee. What the Act contemplates is an express direction by the testator which occasions the accumulation. Such expressions as "direction," "in directing the accumulation," "the accumulation directed," occur seven times in the first section of the Act. There is a conflict of authority upon the construction of this Act upon this particular point. Lord *Eldon*, in the case of *Griffiths* v. *Vere* (11), distinctly states his

(1) 3 D. M. & G. 40.
(2) 1 Sm. & Giff. 475.
(3) 10 Hare, 415.
(4) 2 Sim. (N.S.) 91.
(5) 9 Hare, 605.
(6) 27 Beav. 196.
(7) 10 Sim. 487.
(8) 10 H. L. C. 656.
(9) 2 Keen, 313.
(10) 16 Beav. 14.
(11) 9 Ves. 127.

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opinion that the Act does not apply to a case in which the accumulation is not occasioned by a direction in the will, and that it does not apply to an accumulation which arises, not by a direction of the testator, but by simple operation of law. Sir *Lancelot Shadwell* expressed a similar opinion not once, but three times in three different cases. In *Elborne* v. *Goode* (1) he stated his opinion to be, that if from operation of law an accumulation took place, and not from any express direction in the will, the statute did not apply. He decided that same point in the case of *Corporation of Bridgnorth* v. *Collins* (2), and again in the case of *Lombe* v. *Stoughton* (3) he expressed a similar opinion. As to *Lombe* v. *Stoughton* it is to be observed that the opinion expressed during the argument is in some degree different from that which is stated in his final judgment, for at page 312 of the report he says that it appeared to him, on the plain words of the will, that an accumulation was directed. *McDonald* v. *Bryce* (4) was a very remarkable case, and upon this point certainly was not argued. The argument turned upon whether the residuary legatee or the next of kin were entitled.

Now, there are undoubtedly dicta of Lord *Cranworth's* irreconcilable with these opinions of Sir *Lancelot Shadwell* and Lord *Eldon;* and there is a remarkable decision in the House of Lords in the case of *Countess of Bective* v. *Hodgson* (5). In that case there was no direction in the will as to the mode of dealing with the property which made the accumulation necessary, and it could occur only in consequence of the nature of the limitation over and the time at which it was to take effect. But at the conclusion of the argument, and suddenly, it occurred to the mind of Lord *Westbury* that the time when the gift was to take effect in possession and enjoyment would carry to the person who was to possess and enjoy it an accumulation beyond the period of twenty-one years from the testator's death. Thereupon, without any adequate or any consideration, it was thought necessary to guard the decree of the House of Lords by a direction, founded on the *Thelluson Act*, as applying to that case. But it

(1) 14 Sim. 165.
(2) 15 Ibid. 538.
(3) 12 Sim. 304.
(4) 2 Keen, 276.
(5) 10 H. L. C. 656.

never could have been the intention of the House of Lords, by inserting words in a decree on a point not argued at all, to overrule the opinions of Lord *Eldon*, and alter the operation of the Act. In the present case it seems to me that that difficulty does not occur, because on the true construction of the testator's will the accumulation with which the Court has now to deal arises from the directions of the testator, and not by operation of law. His direction is, that the surplus income of his property shall be invested from time to time. That is a clear direction to accumulate; a trust to invest the surplus income from time to time is neither more nor less than an express trust for accumulation. No doubt the word "accumulate" does not occur, but the investment from time to time of the surplus income is an accumulation. Therefore the *Thelluson Act* makes it the duty of the Court to declare now that the accumulation beyond the period of twenty-one years after the death of the testator cannot have effect, and that those accumulations must be treated as property undisposed of, and as belonging to the next of kin. No question here has been raised like the question in *McDonald* v. *Bryce* (1) between the residuary legatee and the next of kin. Indeed, I understand it to be now in a great measure settled that where the statute comes into operation, and where the Court has to deal with accumulations beyond the period allowed by the Act of Parliament, the next of kin, and not the residuary legatee, are entitled. But that is sometimes a question of great difficulty. In the very same volume of Mr. *Keen's* Reports in which Lord *Langdale's* remarkable decision in favour of the next of kin in *McDonald* v. *Bryce* was pronounced, there is reported the case of *O'Neil* v. *Lucas* (2), where there was a direct trust to accumulate the dividends upon a legacy of £3000, and the accumulation was directed for a period that exceeded twenty-one years from the death of the testator. In that case counsel took this distinction,—that in *McDonald* v. *Bryce*, where the next of kin was held to be entitled, there was no express trust for accumulation of a gross sum of £3000, separated from the assets, but that in a case where the testator had said that the residue of the property, that is, all that he had not before given, was to go to the residuary legatee, the accumulations beyond the statutory period should belong to the residuary legatee,

(1) 2 Keen, 276. (2) 2 Keen, 313.

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and not to the next of kin. The case was decided on that view in favour of the residuary legatee. In the present case it is quite clear, if that is a sound distinction, the direction to accumulate is found here so incorporated with the gift of the residue that no strong argument in support of any right on the part of the residuary legatee could, I think, be maintained. Therefore it seems to me that the next of kin are entitled to the accumulations for the excessive period.

There remains the question upon the bond. *Benjamin Sorsbie,* who is entitled to a moiety of the residuary estate in the events that have occurred, was indebted to the testator in money bonds on which he was bound with a penalty. The testator accompanied his bounty in giving half of the residue with another bounty, in the shape of a direction to postpone the payment of the bonds.

The words of the testator are, that upon the happening of the event of *Benjamin Sorsbie* becoming entitled to a moiety of the residue, the debts and sum of money then due to the testator from him, *Benjamin Sorsbie,* and all interest thereon, should be a charge upon and deducted from his share of the residue. Great stress is laid upon the words "the debts and sums of money and all interest thereon." It is said that the words "all interest" are not satisfied unless interest, to the full amount due, though exceeding the penalty of the bond, be allowed. But it is well settled that a debt due upon a bond as to the interest cannot be recovered at law beyond the amount of the penalty. There are two exceptions recognised in this Court: one is, where the obligor prevents the obligee by an injunction from proceeding at law. That is grounded upon the act of the obligor preventing the recovery of the money. The other exception is, where a mortgage is given not for the amount of the penalty, but for the whole principal debts; and all interest that may accrue in respect of it. This was decided in the case of *Clarke* v. *Lord Abingdon* (1). Sir *William Grant* says, in that case, "if he sues upon the bond he cannot have interest beyond the penalty, but the mortgage is to secure payment not of the bond, but of the sum for which the bond was given, together with all interest that may accrue due thereon" (2). The ground of this decision is, that if the creditors resort to the mortgage the

(1) 17 Ves. 106. (2) 17 Ves. 109.

penalty is no measure of the extent of the obligation. The mortgage is not for that. No right of redemption on payment of the penalty is reserved.

In the case of *Hughes* v. *Wynne* (1), before Sir *John Leach*, where the debtor by the bond conveyed property in trust to sell and discharge all his bond debts, together with the interest then due and to grow due for the same to the day of payment, that learned Judge held that there was not security given for more than the amount that could be recovered at law.

In the present case my opinion is, that the legal liability upon the bond is the measure of the amount to be deducted from *Benjamin Sorsbie's* moiety of the residue of the testator's estate.

The words where the testator speaks of what is due mean what is due upon the legal obligation, for there are no other means of ascertaining what is due but by looking at the bond, and seeing the extent of the legal obligation.

Solicitor for the Trustees, Next of Kin, and *Robert Sorsbie:* Mr. *Biggenden.*

Solicitors for the Assignees of *Benjamin Sorsbie:* Messrs. *Field, Roscoe, & Co.*

Solicitors for the Defendant *Keble*: Messrs. *Hodding, Townsend, & Lee.*

HUMPHREYS *v.* HUMPHREYS.

Will—Life Estate by Implication.

Testator, after giving an annuity and legacies to his wife, and an annuity to his father for his life and that of his (testator's) mother, left several legacies which he wished to be paid duty free after the death of his father and mother; after his wife's death he directed the remainder of his property to be equally divided among his brothers and sisters, if living; if dead, among his nephews and nieces:—

Held, that the widow took a life estate by implication in the residue.

EDWARD HUMPHREYS, by his will, dated the 23rd of August, 1858, after appointing his brother *Thomas* and his wife

(1) 1 My. & K. 20—24.

V.-C. S. 1867 HUMPHREYS v. HUMPHREYS.

Mary Humphreys executor and executrix of his will, gave directions as to his funeral, and left to his dear wife £70 per annum for her life, and £200 to be paid to her in addition as soon as possible after his death. He also left her a power of disposition over £500 standing in his executors' names, and also all his books, paintings, and prints belonging to him at No. 12, *Carlton House Terrace, London;* and also the use of his plate for her life. At her death, he wished the plate to be given to his niece, *Ann Drinkwater*, for her own property. The testator then left to his dear father £70 per annum for his life and his (testator's) dear mother's, *Ann Humphreys;* all his property that might be at his father's, *Norbury*, at his death, he left to his dear father, *Evan Humphreys*. The testator then bequeathed fifteen pecuniary legacies, which he wished to be paid duty free, after the death of his father and mother. He left his gold watch to his nephew *Edward*, his silver watch and chain to his nephew *George*, and all his guns, and the apparatus belonging to them, to his brother *Thomas*. Then followed these words: "I leave to my niece, *Ann Drinkwater*, £200 in addition to the £200 already named: after my dear wife's death, *Mary Humphreys*, I leave the remainder of my property to be equally divided among my brothers and sisters, if living; if dead, then to my nephews and nieces."

The testator died on the 20th of October, 1864, his brother *John*, named in the will, having pre-deceased him. He left about £8000, producing an income of about £240 a year. His brother *Thomas* filed this bill to administer the trusts of the will, and asking specifically for the disposal of the surplus. The usual decree was made on the 22nd of July, 1865, and the Chief Clerk made his certificate on the 13th of July, 1866, finding that there were no debts and a surplus income above the annuities. One of the questions raised on the will was, whether the testator's widow took a life estate by implication in the residue. The testator's father was dead, but the mother still living.

Mr. *Batten*, for the Plaintiff:—

The first question, is whether the testator's widow takes a life estate by implication in the residue. The rule as to real estate is well settled, viz. that where there is a gift to the heir after the

death of *A.*, *A.* takes a life estate by implication, but no such implication arises where the gift is to a stranger: *Horton* v. *Horton* (1); *Jarman* on Wills (2), and the cases there cited. There is no distinction as to personal estate, and therefore, under this will, the widow takes no interest in the residue.

Mr. *Kay*, Q.C., for parties in the same interest:—

The rule as to real estate will not be disputed, and the same principle may apply to personal estate where the gift is, after the death of *A.*, to the next of kin; but there is no such implication in any other case. The authorities are collected in *Tudor's* Leading Cases (3). This was the principle of *Cranley* v. *Dixon* (4). Vice-Chancellor *Kindersley*, in *Stevens* v. *Hale* (5), expressly decided this point. In *Blackwell* v. *Bull* (6), it was decided that the widow took a life estate by implication, but the decision proceeded expressly on the intention apparent on the face of the whole will.

In all the cases in which the Court has implied a life estate from the gift of residue, there has been something in the will, irrespective of the residuary gift, to strengthen the probability that such was the testator's intention, but here it is sought to collect the intention from the language of the residuary gift itself.

It is submitted, on the whole case, that no life estate arises in the widow by implication.

[*Aspinall* v. *Petvin* (7) was also cited.]

Mr. *E. F. Smith*, Q.C., and Mr. *Rawlinson*, for the widow:—

There is no analogy between real and personal estate, as to this question.

The ground of the decision as to real estate was, that where the testator postponed the enjoyment of his heir, it must have been to give a previous life estate. But at law, as to personal estate, the executor, and not the next of kin, would have taken possession, and the cases are therefore dissimilar. In *Roe* v. *Summerset* (8), Mr. Justice *Willes* and Mr. Justice *Blackstone* held that

(1) Cro. Jac. 74, 75.
(2) Vol. i. p. 497.
(3) 2nd Ed. p. 560.
(4) 23 Beav. 512. 3 Jur. NS 531.
(5) 2 Dr. & Sm. 22.
(6) 1 Keen, 176.
(7) 1 S. & S. 544.
(8) 5 Burr. 2608.

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where the words were, "I give to my daughter *Mary*, after the decease of my daughter *Betty*, my house," *Betty* took a life estate by implication. It was stated in the report that Mr. Justice *Willes* spoke slightingly of the case in *Moore* (1), *Rayman* v. *Gold*, and Mr. Justice *Blackstone* still more slightingly of *Horton* v. *Horton* (2). Even as to real estate the decisions are not uniform. In *Cockshott* v. *Cockshott* (3), the Court rejected certain words which appeared to militate against the construction favourable to an implied life estate, and held that the widow took an estate during widowhood by implication. In *Blackwell* v. *Bull* (4), and *Bird* v. *Hunsdon* (5), it was held that the widow took life estates by implication in the residuary estate.

SIR JOHN STUART, V.C.:—

The testator, after giving pecuniary legacies, after the death of his wife, gives his residue to classes of residuary legatees ascertainable only on his wife's death. He says, "After my dear wife's death I leave the remainder of my property to be equally divided amongst my brothers and sisters, if living; if dead, then to my nephews and nieces." The question is, whether the wife, on whose death the residuary legatees are to take, is entitled to the income of the residue, or whether it passes to the residuary legatees as part of the residue.

The proposition of law which governs cases of this kind is very well stated in Mr. *Jarman's* treatise (6). The substance of the proposition is, that where a person during whose life a gift is not to take effect is named by the testator, it is considered probable that he is named for the purpose of receiving a benefit, and still more probable, if the person who is to take upon the death of such person is one who would have been entitled in case there had been no gift at all.

In most of the cases the matter relied on as strengthening the probability has been found either in the language of the will or in the character of the person who is the object of the gift over. The cases of *Roe* v. *Summerset* (7), and *Bird* v. *Hunsdon*, have

(1) Page 635.
(2) Cro. Jac. 74, 75.
(3) 2 Coll. 432.
(4) 1 Keen, 176.
(5) 2 Sw. 342.
(6) 3rd Ed. vol. i. p. 497.
(7) 5 Burr. 2608.

never been overruled, and they decide that where a testator has used language shewing a probable intention, unless there is something in the will to rebut that probability, the Court is not justified in overruling it. Unfortunately, however, in the current of authorities so much stress has been laid on the circumstance strengthening the first probability, that it has been declared by some Judges, that unless there be the concurrence of two things, namely, an antecedent probability, strengthened by another probability suggested by the character of the object of the gift over, the first probability is insufficient. In the argument in *Aspinall* v. *Petvin* (1), Mr. *Sugden* contended that if an estate were given to a stranger after the death of *A.*, *A.* would take by implication, but Sir *John Leach* said, if the gift were to the heir after the death of *A.*, *A.* would take a life estate, because the devisor would not have suspended the enjoyment by the heir without intending to give it to *A.*

In the present case the testator gives the property to his brothers and sisters after the death of his wife. Nothing can be clearer than that the brothers and sisters take nothing till the death of the wife, and cannot until her death be ascertained. Why, then, does the testator postpone their enjoyment until his wife's death? Can there be suggested any other reason except this, that he intended the wife to have the enjoyment of the property for her life? This is the very reason given by Sir *John Leach* why, where a testator gives an estate to his heir after the death of *A.*, *A.* takes a life estate by implication. In the present case there is the additional circumstance that until the wife's death it is impossible to say who are the persons entitled.

There is also this further difficulty in the way of those who oppose the wife's claim, that if I should hold she is not entitled to the income, I must declare that it belongs to persons who cannot be now ascertained.

This is a stronger case than any of those in which the dicta of the learned Judges to which I have referred were pronounced, and, therefore, independently of the authority of *Roe* v. *Summerset* (2), and *Bird* v. *Hunsdon* (3), I must hold that a life estate arises in the wife by implication.

(1) 1 S. & S. 544. (2) 5 Burr. 2608. (3) 2 Sw. 342.

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Lord *Romilly*, in *Holgate* v. *Jennings* (1), remarks that *Roe* v. *Summerset* (2), and *Bird* v. *Hunsdon* (3), proceed upon distinctions. There certainly is this peculiarity; *Roe* v. *Summerset*, reported by *Burrowes*, is also reported by Sir *William Blackstone*, who was one of the Judges by whom it was decided. According to the report in *Burrowes*, Sir *William Blackstone* spoke slightingly of the case of *Horton* v. *Horton* (4), and Mr. Justice *Willes*, afterwards Chief Justice of the Common Pleas, a still greater lawyer, spoke more slightingly of the case of *Rayman* v. *Gold* (5). In other words, they spoke slightingly of the doctrine which requires as essential a second probability to fortify the first. It is to be observed, however, that in his own report, Sir *William Blackstone* (6) says the gift over was to the other *cestui que vies*, meaning, as I understand him, that the gift over to the second *cestui que vie* was upon the death of the first. The question was, whether there was an implication of a gift to the first *cestui que vie* for life, because of the gift over to the second after the death of the first. Both the learned Judges were of opinion that the life estate by implication arose—but Mr. Justice *Blackstone's* observation is, that the gift over was to the other *cestui que vie*, by which I understand him to mean that this circumstance shewed a disposition to place both the *cestui que vies* on the same footing.

Stevens v. *Hale* (7), has been relied on by the residuary legatees as in their favour; but it appears to me Vice-Chancellor *Kindersley* proceeded on the special facts of the case, and not on the principle involved in this case.

On the whole will, I am of opinion that a life estate arises by implication in the testator's widow.

Solicitors for the Plaintiff, and those in the same interest: Messrs. *Clowes & Hickley*, agents for Mr. *L. W. Jarvis, Lynn, Norfolk.*

Solicitors for the Widow: Messrs. *Walters, Young, & Walters.*

(1) 24 Beav. 623.
(2) 5 Burr. 2608.
(3) 2 Sw. 342.
(4) Cro. Jac. 74, 75.
(5) Moore, 635.
(6) W. Bl. 622.
(7) 2 Dr. & Sm. 22.

BERNDTSON *v.* STRANG.

V.-C. W.
1867
June 27, 28; July 2.

Stoppage in Transitu—Ship chartered by Purchaser.

A., a merchant in *Sweden*, contracted to sell timber to *B.*, a firm in *London*, it being provided by the contract, in the first instance, that the price of the timber to be shipped to *London* was "free on board," payable by buyer's acceptance of seller's drafts at six months from date of bills of lading, the vendor to provide ships for conveyance of the timber to *London*.

By subsequent agreement, a ship was chartered for the purpose by *B.*, on which the timber was shipped by *A.*, who caused the bill of lading to be drawn in his name as shipper of the timber, which was made deliverable "unto order or assigns." The bill of lading, in this form, was indorsed in blank by *A.*, and sent to *B.* in return for his acceptance of a bill of exchange drawn upon him by *A.* for the price of the timber.

The ship was forced to put into *Copenhagen* in distress, and while there *B.* stopped payment, and *A.* gave notice of stoppage *in transitu*:—

Held, that the effect of the delivery of the timber on board the chartered ship, coupled with the form of the bills of lading adopted by *A.* for his security, in which the timber was made deliverable "unto order or assigns," was to interpose the master as a carrier between *A.* and *B.*, so as to preserve the right of stoppage *in transitu* until the ship, the instrument of transit, had reached *London*.

THIS was a suit for the purpose of establishing the right of the Plaintiff, by virtue of the exercise of his right of stoppage *in transitu*, to a charge in equity upon the proceeds of certain timber sold by him to a firm in *London*, of whom the Defendants were the assignees under a deed for the benefit of creditors.

The facts, which were not in dispute, were thus stated upon the bill:—

The Plaintiff, who is a timber merchant of *Gefle*, in *Sweden*, through his *Paris* agent, *Charles Von Kock*, entered into a contract in February, 1863, for the sale to Messrs. *Langton & Robinson*, a *London* firm, of a quantity of timber. The contract, which was reduced into writing, and signed by Messrs. *Langton & Robinson*, after stating the quantities of timber and the prices, proceeded thus:—

"And the said prices, *franco on bord*, payable by buyer's acceptance of seller's drafts at six months from date of bills of lading. Shipment to *London* Sellers to provide ships to a

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freight not exceeding 53*s.* in full, per Petersburger standard, with two or three guineas of gratification per 100 Petersb. stand. in case of need. If ships cannot be chartered within this limit the contract to be void."

It was subsequently agreed that, instead of *Berndtson* providing a ship for conveyance of the timber, *Langton & Robinson* should themselves charter a vessel to convey the timber from *Gefle* to *London*.

Messrs. *Langton & Robinson* accordingly chartered a ship, the *Maastrom*, which proceeded to *Gefle*, and on the 22nd of October, 1863, *Berndtson* shipped the timber on board of her. The price of the timber amounted to £1589 12*s.* 6*d.*, and an advance of £153 8*s.* 2*d.* was made by *Berndtson* to the captain of the ship on account of the freight. These sums, together with three months' interest at 5 per cent. on the advance, amounted to £1744 19*s.*, and accordingly, in pursuance of the contract, *Berndtson*, on the 22nd of October, 1863, drew a bill of exchange of that date for this amount upon *Langton & Robinson*, payable six months after date. At the same time, in order, as the bill alleged, to preserve his control over such timber, *Berndtson* caused the bill of lading to be drawn in his name as shipper of the timber, and the same was thereby made deliverable to the order or assigns of *Berndtson*.

The bill of lading was as follows:—

"Shipped in good order and well conditioned by *F. M. Berndtson*, in and upon the good ship called the *Maastrom*, whereof is master for this present voyage *Alsing*, and now riding at anchor in this port, and bound for *London*,

1179 $\frac{7}{12}$ dozen of deals,

being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of *London* (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted), unto order, or to assigns, he or they paying freight for the said goods, and other conditions, as per charterparty, primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and

date, the one of which three bills being accomplished the others to stand void.

"Dated in *Gefle*, 22nd of October 1863. The cargo delivered without delay. Two deals in dispute. Clear of all damage.

"*Frederik Alsing.*

"Rec$^{d.}$ as anticipation on the freight	R2700	17	60
Rmb.	£153	8	2
"Ins$^{ce.}$ 3 %	4	12	1
	£158	0	3

"*Frederik Alsing.*

"For loading have been used twenty-four days."

Berndtson indorsed this bill of lading in blank, and caused it to be handed over to *Langton & Robinson*, in exchange for their acceptance of the bill of exchange for £1744 19*s*. On receipt of the bill of lading Messrs. *Langton & Robinson* deposited it, together with a policy of insurance of the cargo of timber and other securities, with Messrs. *Churchill & Sim*, as a security for repayment of moneys due to them from *Langton & Robinson*.

The *Maastrom*, with the timber on board, sailed for *London*, but met with disasters on her voyage, got stranded, and on the 16th of November, 1863, was forced in distress to put into the port of *Copenhagen*, where she remained for some months. On the 16th of February, 1864, *Langton & Co.* suspended payment, and subsequently, on the 9th of September, 1864, they executed a deed of assignment to the Defendants, *Strang*, *Sieveking*, and *Pack*, as trustees for the benefit of their creditors. While the *Maastrom* was still lying in the port of *Copenhagen*, *Berndtson* caused the captain to be served with a notice, dated the 24th of March, 1864, to stop the timber *in transitu*.

On the 26th of April, 1864, the *Maastrom* arrived in the *Thames*, whereupon a second notice of stoppage *in transitu* was served on board the ship and also on the shipbrokers, and on Messrs. *Churchill & Sim*.

The timber was taken possession of by *Churchill & Sim* as mortgagees, and a sum of £1276 15*s*. 6*d*. was produced by the sale of it. The proceeds of the timber, with the moneys received

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under the policy, amounting in all to £1570, had been paid into Court by Messrs. *Churchill & Sim*, who had been satisfied out of their other securities.

The bill of exchange for £1744 19*s.* was dishonoured at maturity.

The proceeds of the timber having been claimed by the trustees of the creditors' deed executed by *Langton & Robinson*, this bill was filed by *Berndtson*, charging that, by the exercise of his right of stopping the timber *in transitu*, he was entitled in equity to a valid and subsisting charge for the money due in respect of the price of the timber, and praying relief upon this footing.

A dividend of 5*s.* in the pound on the whole amount of his claim on the estate had been paid to the Plaintiff by the trustees of the creditors' deed without prejudice.

Mr. *G. M. Giffard*, Q.C., and Mr. *Kay*, Q.C., for the Plaintiff:—

Until the goods come into the actual possession of the purchaser the vendor retains his right, in case of the insolvency of the purchaser, to stop them *in transitu;* and delivery on board a ship chartered by the purchaser, and not his own ship, is not such a delivery into the hands of the purchaser as will preclude that right of stoppage *in transitu*, there being a distinction between a delivery on board the purchaser's own ship and a delivery on board a general ship, or a ship chartered *ad hoc*. The master of the chartered ship, who is interposed as a mere carrier between the consignor and consignee, is not the agent of the purchaser for the purpose of putting an end to the *transitus*, nor is his possession the possession of the purchaser: *Bohtlingk* v. *Inglis* (1); *Gurney* v. *Behrend* (2); *Bloxam* v. *Sanders* (3).

The terms of the bill of lading "to order or assigns" shew distinctly that the delivery was not complete, and that the Plaintiff, when he shipped the timber on board the *Maastrom*, had no intention of parting with the dominion over it, or of vesting the absolute indefeasible property in the purchasers: *Turner* v. *Trustees of Liverpool Docks* (4).

[They also cited *Schotsmans* v. *Lancashire and Yorkshire Railway*

(1) 3 East, 381.
(2) 3 E. & B. 622.
(3) 4 B. & C. 941.
(4) 6 Ex. 543.

Company (1); *Thompson* v. *Trail* (2); *Lickbarrow* v. *Mason* (3); *Smith's* Mercantile Law (4); and referred to 18 & 19 Vict. c. 111.]

Mr. *Druce*, Q.C., and Mr. *Freeling*, for the Defendants:—

The property in the goods was so completely vested in *Langton & Robinson* at the time of their insolvency that the right of stoppage *in transitu* did not exist. An attempt has been made to draw a distinction between a general ship belonging to the buyer, and a ship chartered *ad hoc* by the buyer; but the question does not depend upon this distinction: *Schotsmans* v. *Lancashire and Yorkshire Railway Company*.

Delivering on board the ship chartered by the purchaser, especially where, by the terms of the contract, the delivery is to be "free on board," is a final delivery at the place of destination: *Van Casteel* v. *Booker* (5). The effect of such delivery may be restrained, and the right to stop the goods *in transitu* may be preserved by the vendor taking bills of lading and making the goods deliverable to his order or assigns. That has been attempted by the vendor in this case, but looking at the payment stipulated for in the contract—not in cash, but in accepted bills of exchange—as soon as he has parted with the bill of lading, and received in return for it the accepted bills of exchange, he has taken off the fetter which he had himself imposed.

Nothing further then remains to be done; the vesting of the property in the goods in the purchaser is complete, and the right of stoppage *in transitu* is at end: *Cowasjee* v. *Thompson* (6); *Browne* v. *Hore* (7); *Green* v. *Sichel* (8).

Mr. *Giffard*, in reply:—

Cowasjee v. *Thompson* turned entirely on whether there was an unconditional delivery on board, and the question of stoppage *in transitu* was not raised in that case.

Stoppage *in transitu* is the assertion of a right of lien, and does not depend upon whether the right of property has vested in the

(1) Law Rep. 2 Ch. 332.
(2) 6 B. & C. 36.
(3) 1 Sm. L. C. 595, 4th Ed.
(4) Pages 309, 555, 560.
(5) 2 Ex. 691.
(6) 5 Moo. P. C. 165.
(7) 3 H. & N. 484; S. C. affirmed in error, 4 H. & N. 822.
(8) 7 C. B. (N. S.) 747.

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purchaser, the question being whether the property is "at home;" in other words, although the property is vested in the purchaser, he has not an indefeasible right to the possession: *Bloxam* v. *Sanders* (1); "the essential feature" of a stoppage *in transitu* being "that the goods should be at the time in the possession of a middleman, or some person intervening between the vendor who has parted with, and the purchaser who has not yet received, them:" *Schotsmans* v. *Lancashire and Yorkshire Railway Company* (2).

July 2. SIR W. PAGE WOOD, V.C.:—

The question in this case is, whether the Plaintiff is entitled to such a declaration as was made in *Spalding* v. *Ruding* (3), of his equitable right of stoppage *in transitu* over certain timber sold by him, and for the price of which bills of exchange were drawn, which were unpaid at the time the consignees became insolvent: the question being whether, under all the circumstances of the case, the consignees having simply mortgaged the bills of lading, which brings the case so far within *Spalding* v. *Ruding*, the Plaintiff is entitled to the surplus assets as against the Defendants, who are the representatives, under a deed of composition, of the original consignees.

Spalding v. *Ruding* was, I think, the first case in this Court in which this right was asserted as against property which had so far passed into the hands of the consignee that he was enabled by mortgage of the bills of lading to pass the interest in the goods to the extent of that mortgage; and there the right of stoppage *in transitu* was upheld as against the surplus.

The case, which was originally decided by Lord *Langdale*, and affirmed by Lord *Lyndhurst* (4), was no doubt, in some degree,

(1) 4 B. & C. 948.

(2) Law Rep. 2 Ch. 332.

(3) 6 Beav. 376.

(4) 15 L. J. (Ch.) 374. Lord *Lyndhurst's* judgment was as follows:—

The Plaintiffs, as the shippers of the goods in question, would have had a right at law to stop them *in transitu* as against *Thomas*, the vendee, by reason of his insolvency; but by the indorsement of the bills of lading to the Defendant (*Ruding*) for value, that right was taken away. The question then is, what right the Defendant had acquired against the vendors by their transactions with *Thomas*. The bill of lading, &c., were transferred to them by *Thomas*, to secure the repayment of

an extension of what was supposed to be the right of the consignor. In some of the cases there were *dicta* which seemed to shew that by the indorsement of the bill of lading in such a manner as to admit of a dealing with it, and by actual dealing with, or actual negotiation of such bill of lading to a *bonâ fide* transferee, the vendor's right to stop *in transitu* would be defeated. That was the great ground of argument in *Spalding* v. *Ruding* (1), and I mention the case as shewing the extent to which the right has been upheld, and that it is a right entirely distinguished from the right of property in the goods.

The Plaintiff in this case sold to Messrs *Langton*, who have become insolvent, certain timber under a contract of sale, specifying the price, "free on board, payable by buyer's acceptance of seller's drafts at six months from date of bills of lading. Shipment to *London*." It was also provided that the sellers were to provide ships.

A good deal was said about these words "free on board," but as regards the original contract it would be plain enough that there was no intention that the goods should be at their destination when they were free on board, as not only was *London* the place of destination, but the seller was to find the vessel, and undertook that the goods should be delivered in *London*. Although the property in the goods might well pass when the bill of lading was handed over in exchange for the accepted bills, still that

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the £1000, the sum advanced to *Thomas* by means of the Defendant's acceptance. This I consider to be the true construction and effect of the memorandum or letter of the 9th of June, 1841. They had a clear right, therefore, to retain the goods, and to be paid out of the proceeds to the extent of those advances according to the terms of the agreement. They had both a legal and an equitable right to this extent. In this state of things the vendors attempt, by a notice to the captain, to stop the goods *in transitu*. This, I think, upon the evidence, was given in time, and though not good in law, by reason of the assignment of the bills of lading, would, I am of opinion, be valid in equity against both the vendee and the Defendant so as to vest in Plaintiffs a right to the surplus of the produce of the wheat, after discharging the sum for which it was pledged. The Defendant could not, under these circumstances, retain the surplus as against the vendors towards the liquidation of his general balance due to *Thomas* the vendee. If this view of the case be, as I think it is, correct, it was proper for the decision of a Court of equity, and the appeal must be dismissed with costs.

(1) 6 Beav. 376.

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does not determine the question as to the right to stoppage *in transitu*, the distinction being well established upon all the authorities, and especially referred to in *Van Casteel* v. *Booker*, where, during the argument, Mr. (now Baron) *Martin*, so far conceding against the interest of his client, says (1):—"The general rule is that if goods are shipped on board a chartered vessel the property vests in the consignee, subject to the right of stoppage *in transitu*; but if the goods are placed on board the purchaser's own ship, that is an absolute delivery—the same as if placed in his cart. The shipper may, however, protect himself by taking a bill of lading making the goods deliverable to his own order only; but in that case the property would pass as soon as he indorsed the bill of lading generally."

In the same way, Lord *Chelmsford*, in *Schotsmans* v. *Lancashire and Yorkshire Railway Company* (2), says in reference to the case of *Mitchel* v. *Ede* (3), "It appears to me that this case was not decided upon the distinction between a general ship and one sent for the express purpose of receiving the sugar; for if it had been a question of stoppage *in transitu* upon a sale of the sugar to the Defendants, and it had been delivered into the Defendants' own vessel, sent out for the purpose, although the property in the goods would have passed, yet the effect of the delivery would have been restrained by the indorsement on the bill of lading, and the right to stop *in transitu* would have been preserved."

Much stress has been laid upon those words "free on board," as being an indication of the nature of the contract—that the *transitus* was at an end when the goods were on board the purchaser's own ship. But those words cannot have any such effect in a contract framed as this was, where the intention, as expressed by the contract, was, that there was to be no delivery on board the purchaser's own ship, as the vendor was to find a ship (although at the cost of the purchaser), and send the ship, with the cargo, to *London*, where the *transitus* would be at an end. That contract, however, was varied by parol, by the arrangement subsequently made, under which the vendor was no longer to find a ship,

(1) 2 Ex. 699. (2) Law Rep. 2 Ch. 337.
(3) 11 Ad. & E. 888.

but was discharged from that part of his engagement. A ship chartered by the purchaser is sent out from *London* for the purpose of taking on board this cargo, subject, of course, to the payment of freight when the cargo should be delivered pursuant to the charterparty. That being so, the vendor takes the additional precaution, notwithstanding the purchaser charters the ship, of taking the bill of lading in this form:—"Shipped by him (the vendor), to be delivered at the port of *London*, unto order or to assigns." The bill of lading having been taken in this form the bills of exchange are drawn and accepted, and while the ship was on her voyage the bill of lading was indorsed in blank—a circumstance very strongly relied upon by Mr. *Druce*—and delivered to the purchaser in exchange for the accepted bills of exchange. No doubt the property in the goods would pass, but that does not determine the question whether the *transitus* was at an end. With the single exception that the bills of lading are made out in the name of the vendor to his order, or assigns, and then by him indorsed in blank, the case does not really differ from *Bohtlingk* v. *Inglis* (1), nor from *Spalding* v. *Ruding* (2), where the purchaser had the bill of lading handed over to him so as to vest the property in him.

Does, then, the shipping of goods, in the name of the vendor, and indorsing over the bill of lading, show an animus on the part of the vendor to part with his lien and abandon his right of stoppage *in transitu?* Now there are two *criteria*, as it appears to me, with respect to the stoppage *in transitu*, viz.: whether there is a *transitus* at all? and if so, where it is to end? If a man sends his own ship, and orders the goods to be delivered on board his own ship, and the contract is to deliver them free on board, then the ship is the place of delivery and the *transitus* is at end, just as much (as was said in *Van Casteel* v. *Booker* (3)) as if the purchaser had sent his own cart, as distinguished from having the goods put into the cart of a carrier. Of course there is no further *transitus* after the goods are in the purchaser's own cart. There they are at home, in the hands of the purchaser, and there is an end of the whole delivery. The next thing to be looked to

(1) 3 East, 381. (2) 6 Beav. 376.
(3) 2 Ex. 691.

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is, whether there is any intermediate person interposed between the vendor and the purchaser. Cases no doubt may arise, where the *transitus* may be at an end although some person may intervene between the period of actual delivery of the goods and the purchaser's acquisition of them. The purchaser, for instance, may require the goods to be placed on board a ship chartered by himself and about to sail on a roving voyage. In that case, when the goods are on board the ship everything is done; for the goods have been put in the place indicated by the purchaser, and there is an end of the *transitus*. But here, where the goods are to be delivered in *London*, the Plaintiff, for greater security, takes the bill of lading in his own name, and, being content to part with the property in the goods, subject or not, as the case may be, to this right of stoppage *in transitu*, he hands over the bill of lading in exchange for the bill of exchange. In that ordinary case of chartering it appears to me that the captain or master is a person interposed between vendor and purchaser in such a way that the *transitus* is not at an end, and that the goods will not be parted with, and the consignee will not receive them into his possession, until the voyage is terminated and the freight paid according to the arrangement in the charterparty.

Bohtlingk v. *Inglis* (1), which has been frequently cited, and never, as far as I can discover, with disapprobation, seems to have furnished the rule which was alluded to in argument in *Van Casteel* v. *Booker* (2), viz., that if the goods are delivered on board a chartered ship, the property vests in the consignee, subject to the right of stoppage *in transitu*. Mr. Justice *Lawrence*, in delivering the judgment of the Court, says (3): "For the benefit of trade, a rule has been introduced into the common law, enabling the consignor, in case of the insolvency of the consignee, to stop the goods consigned before they come into the possession of the consignee, which possession *Buller*, J., in *Ellis* v. *Hunt* (4) says, means an actual possession. That the possession of a carrier is not such a possession, has been repeatedly determined, and the question now is, whether the possession of the master be anything more than the possession of a carrier, and not the actual possession of the bank-

(1) 3 East, 381.
(2) 2 Ex. 691.
(3) 3 East, 395.
(4) 3 T. R. 466.

rupt. . . . It does not differ from a similar contract entered into by the consignor, by the directions of the consignee, at the loading port, for the conveyance of the goods from him to the vendee;" —in other words, it would be exactly like the original engagement in the present case, and the circumstance of the consignee being the person who provides the ship, makes really no substantial difference whatever—"in which case it would hardly be contended that a delivery by the consignor to the master of the ship for the purpose of carriage, would be such a delivery to the vendee as to prevent the right of stoppage *in transitu*. In each case the freight would be to be paid by the consignee; in each case the ship would be hired by him; and there would be no difference, except that in this case the ship, in consequence of the agreement, goes from *England* to fetch the cargo,"—just as in the case now before me—"in the other case, the vessel would bring it immediately from the loading port: both in the one case and in the other the contract is with the master for the carriage of the goods from one place to another; and until the arrival of the goods at their port of destination, and delivery to the consignee, they are in their passage or transit from the consignor to the consignee."

The learned Judge distinguishes the case from that of *Fowler* v. *Kymer* (1), where the ship, being under the complete control of the bankrupt, had the goods put on board her, not for the purpose of conveying them from the consignors to the consignees, but that they might be sent by the consignees upon a mercantile adventure for which they had bought them, and there the delivery to the consignees, being at the place pointed out by them where the delivery should be, was held to be complete. Of course the place of delivery may be as well on board the ship as at the port of her destination. The case of *Van Casteel* v. *Booker* (2) does not appear to me to make any substantial difference. There it was the vendee's own ship, and, as was said by *Parke*, B., in the judgment, if the goods were put on board to be carried for and on the account and risk of the bankrupts, the delivery on board put an end to the right of stopping *in transitu;* but the vendor took the precaution which was held effectual in *Turner* v. *Trustees of*

(1) Cited in *Hodgson* v. *Loy*, 7 T. R. 442. (2) 2 Ex. 691.

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Liverpool Docks (1) of restraining the effect of that delivery by the indorsement on the bill of lading. The Court there (*Van Casteel* v. *Booker* (2)) seems to have thrown out that this precaution stopped the effect of putting the goods on board the vendee's own ship, and indicated an intention not to part with the dominion over the goods, nor vest the absolute property in the bankrupts. The case before me is still stronger, as although the vendor has taken this precaution in order to guard himself against any possible contingency, still the ship is the instrument of transit, and in parting with these bills of lading in exchange for the bills of exchange, he is aware that the ship has been chartered for the purpose of delivering the goods at the port of *London*, and that the master of the ship was not the servant of the vendee, but an intermediate agent who, for hire, when the hire was paid, was to deliver the goods in *London*.

It appears to me, therefore, that until the goods reach *London* the *transitus* is not ended. *Cowasjee* v. *Thompson* (3) differs in every respect from this case. There a ship was sent out, goods were ordered for that ship, and the ship being the property of the person sending her out, the *transitus* was complete when the goods were delivered on board pursuant to order, nothing else being directed or intended by anybody. Again in *Schotsmans* v. *Lancashire and Yorkshire Railway Company* (4), the ship was the ship of the vendee, and the vendor did not take the precaution of preserving his right of stoppage *in transitu* by making the goods deliverable to his order or assigns; the goods by the bill of lading being made deliverable to the purchaser or assigns. The whole case here appears to me to turn upon whether or not it is the man's own ship that receives the goods, or whether he has contracted with some one else *quâ* carrier to deliver the goods, so that, according to the ordinary rule as laid down in *Bohtlingk* v. *Inglis* (5), and continually referred to as settled law upon this subject, the *transitus* is only at an end when the carrier has arrived at the place of destination, and has delivered the goods.

I must, therefore, follow the decision in *Spalding* v. *Ruding* (6),

(1) 6 Ex. 543.
(2) 2 Ibid. 691.
(3) 5 Moo. P. C. 165.
(4) Law Rep. 2 Ch. 332.
(5) 3 East, 381.
(6) 6 Beav. 376.

and declare the Plaintiff entitled out of the fund in Court to the balance due upon the bill of exchange, with interest from the date of maturity.

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Solicitors: Mr. *J. W. Nicholson*; Messrs. *Linklaters, Hackwood, & Addison.*

COVENTRY *v.* GLADSTONE.

V.-C. W. 1867 *July* 16.

Bill of Lading—Transfer for Value—Property in Goods—Custom of Merchants.

A. having ordered goods from *B.*, a firm at *Calcutta*, through *C.*, their agent in this country, received an invoice of the goods, with a notice that *B.* had drawn upon him for the price at six months.

On calling at *C.'s* office, *A.* was met by *C.'s* messenger, who handed to him for his acceptance the bill of exchange drawn upon him in respect of the goods, and the bill of lading, which was pinned to the bill of exchange. *A.* accepted the bill of exchange, and afterwards deposited the bill of lading with *E.* as a security for an advance, together with a policy of insurance upon the goods effected by himself in his own name, *C.* having declined to part with the original policy, on the ground that it included other goods besides those purchased by *A.*

A. having become bankrupt, and unable to take up his acceptance, the goods were claimed by *B.* and *C.*, on the ground that the bill of lading had been improperly pledged, having come into *A.'s* hands irregularly, and without their knowledge, and contrary to an alleged custom amongst *East India* merchants not to part with the bill of lading of goods until the vendee has taken up his acceptances on account thereof:—

Held, that the alleged custom of trade was merely exceptional (as observed by *Crompton*, J., in *Gurney* v. *Behrend* (1)), and was not established by the evidence as being the usual course of business; and that the title of *E.*, as *bonâ fide* assignee for value, must prevail over any claim by the unpaid vendors.

THIS was a suit by the Plaintiffs, carrying on business in the *City* as corn factors and commission agents under the firm of *Coventry, Sheppard, & Co.*, for the purpose of enforcing their rights as assignees for value of a bill of lading for a cargo of linseed.

The bill stated that on the 2nd of November, 1865, *Percival John Waite*, merchant, of *Mincing Lane*, applied to the Plaintiffs

(1) 3 E. & B. 622, 630.

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for an advance upon the following bill of lading, indorsed in blank by *Gillanders, Arbuthnot, & Co.*, which he then produced :—

"Shipped in good order and condition by *Gillanders, Arbuthnot, & Co.*, in and upon the good vessel called the *Ganges*, whereof is master for the present voyage *Funnell*, and now riding at anchor in the river *Hooghly*, and bound for *London*, 1365 bags linseed; five of the above bags are in dispute. If on board to be delivered, being marked and numbered as in the margin, and to be delivered in the like good order and condition at the aforesaid port of *London* (all and every the dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind excepted), unto order or to assigns, he or they paying freight for the said goods at the rate of £1 15*s.* sterling per ton of 20 cwt. net. In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which said bills being accomplished, the others to stand void. Dated in *Calcutta* this 15th day of September, 1865. Weights and contents unknown to *Thomas Funnell*."

The Plaintiffs thereupon, as the bill alleged, in the usual and ordinary course of business, and without notice of any circumstance which might render it improper on the part of *Waite* to pledge the bill of lading, advanced to him £1000 (by cheque) upon this security, for which they received the following acknowledgment, dated the 2nd of November, 1865 :—

"I beg to acknowledge receipt of your cheque for £1000, as advanced upon bill of lading and policy of insurance for 1365 bags of linseed, per *Ganges*, from *Calcutta*, value about £1370 10*s.*, which advance I agree to repay to you, with interest at bank rate, and your commission of 1 per cent., on or before the 16th instant, or in default of my doing so, I authorize you to sell the linseed, and to pay you the difference, if any."

At the same time *Waite* handed to the Plaintiffs an invoice of the cargo, and having effected a policy of insurance for £1500 in his own name on the goods, he sent it to the Plaintiffs within a day or two after the 2nd of November, 1865. In December, 1865, *Waite* was adjudicated bankrupt. On the arrival of the *Ganges* in

the *Thames* in January, 1866, the Plaintiffs having obtained from the shipbrokers an "overside order," applied at the ship for a delivery to them of the linseed. In the meantime, however, Messrs. *Gladstone, Ewart, & Co.*, the correspondents and agents in *London* of *Gillanders, Arbuthnot, & Co.*, had served notices upon the captain and agents of the *Ganges* to stop the delivery of the linseed to any other persons than themselves.

The linseed having been landed at the *East and West India Docks*, the Plaintiffs produced the bill of lading deposited with them, and demanded the delivery of the goods from the dock company. Their demand was, however, refused, in consequence of the counter claims of *Gladstone, Ewart, & Co.* The Plaintiffs thereupon issued a writ against the dock company, but in the meantime, at the instance of *Gladstone, Ewart, & Co.*, who had indemnified the company, the linseed was allowed by the dock company to be removed to the wharf of Messrs. *Brander Brothers*, where (at the time of filing the bill) it was. Under these circumstances the Plaintiffs had filed their bill, praying (1.) That the Defendants, Messrs. *Brander*, might be restrained from delivering the linseed *ex Ganges*, otherwise than to the Plaintiffs or their order; (2.) That Defendants *Gladstone, Ewart, & Co.* might be restrained from interfering in any manner to prevent the Plaintiffs from obtaining possession of the linseed; (3.) The appointment of a receiver, a sale of the linseed, and application of the proceeds in satisfaction of Plaintiffs' claim, and relief in damages and costs.

The case set up by the Defendants, Messrs. *Gladstone, Ewart, & Co.*, against the claim of the Plaintiffs was, that *Waite* obtained and kept possession of the bill of lading wrongfully, and without their knowledge, on the occasion of the delivery of *Gillanders'* draft for acceptance; had wrongfully dealt with such bill of lading in pledging it to the Plaintiffs; and that Plaintiffs and *Waite* acted in the transaction contrary to good faith and the ordinary course of mercantile usage, and (so far as Plaintiffs were concerned) in disregard of circumstances suggestive of doubt or suspicion as to *Waite's* title to the bill of lading.

In support of this case, their answer stated that the bill of lading for the linseed had been inadvertently handed to *Waite* by their messenger, who was about to leave the bill of exchange for his acceptance,

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and had no intention of placing in *Waite's* hands any other instrument besides the draft, without their knowledge, consent, or authority; and that *Waite* had improperly retained the bill of lading and wrongfully made use thereof for his own purposes. They went on to state, and adduced the evidence of two merchants in support of their statement, that the custom and practice of merchants in such transactions was not to deliver the bill of lading to the intended vendee of a shipment of goods until he should have taken up his acceptances on account thereof; and that this custom and practice was well known to *Waite* from former dealings with *Gladstone, Ewart, & Co.*, and that such "custom and practice are always observed, except when the same are waived in courtesy to mercantile houses of very high standing, in whose transactions such precautions are not deemed necessary. But the said *Waite* was not entitled to such courtesy."

The answer went on to state, that before receiving the advice of the shipment of the linseed *Gladstone & Co.* had effected with the *National Provincial Marine Insurance Company, Limited*, a policy of insurance for £2000 on the shipment, dated the 15th of September, 1865. This policy would in the ordinary course of business have been retained by *Gladstone, Ewart, & Co.* until the arrival of the ship, and been then delivered with the bill of lading to *Waite* as the vendee of the linseed, on the arrival of the ship, and on his meeting his acceptance for the goods. It was not delivered to *Waite* at the time when he got possession of the bill of lading, nor did he inquire for the same as would have been customary on receiving the bill of lading in the regular course of business; but, according to the statement contained in the answer and affidavits of *Gladstone, Ewart, & Co.*, *Waite* never mentioned that he had the bill of lading, nor did he insist that he was entitled to the policy of insurance (which is in practice always handed over with the bill of lading of the goods to which it relates, as forming an essential part of the security upon a cargo afloat) on the ground that he had the bill of lading. When *Waite* applied for the policy they declined to part with it unless he took up his bill, and, as a matter of fact, they did not know that he was in possession of the bill of lading until the arrival of the *Ganges* in the port of *London*.

The answer also raised the case that the alleged advance by the

Plaintiffs was made without due caution, and in contravention of the custom of merchants and the regular course of business; that *Waite* was at the time considerably indebted to the Plaintiffs on account, and that his affairs were, within their knowledge, in an embarrassed state, and that the advance was not of actual money, but only in the form of a credit in their books. The Defendants also insisted that the late date of the policy effected by *Waite* himself upon the linseed was sufficient to give the Plaintiffs, as men of business, notice of some defect or irregularity in *Waite's* title to the linseed, as by mercantile custom such shipments are never allowed to remain so long uninsured, and *Waite*, if in rightful possession of the bill of lading, would, in the ordinary course of business, have been also in possession of a policy of much earlier date.

The Plaintiffs, on the other hand, denied the existence of any such custom as was relied upon by the Defendants, not to deliver bills of lading of goods to the purchasers until they had taken up their acceptances on account thereof, and stated that it was not customary for purchasers to give their unqualified acceptances to the agents of foreign houses without receiving the symbols of property usually passed on such occasions; nor was it usual to draw bills of exchange on the purchasers, where it was not intended to give them credit.

In his affidavit in support of the Plaintiffs' case, *Waite* stated that previously to September, 1865, he ordered of *Gillanders & Co.*, of *Calcutta*, through the intervention of *Gladstone, Ewart, & Co.*, a parcel of linseed to be shipped from *Calcutta* to *London* on his account. The order was executed, and the invoice was transmitted to him in a letter dated the 22nd of September, 1865, containing the following passage:—

"We have now the pleasure of handing you invoice of 1365 bags linseed, shipped on your account per *Ganges*, along with a statement, for the balance of which we have drawn on you for £1345 2*s.* 10*d.*, and we hope you will find all in order."

Upon the receipt of this letter *Waite*, on the 21st of October, called at the office of *Gladstone, Ewart, & Co.*, and there saw their clerk or messenger (named *Henry*), who said, "Oh, Mr. *Waite*,

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will you please save me a walk to *Mincing Lane* by putting these papers in your pocket." On taking the papers handed to him by *Henry*, *Waite* found that they were a bill of exchange at six months, drawn by *Gillanders & Co.* upon him for £1345 2*s.* 10*d.*, and pinned to such draft was a bill of lading by the *Ganges*, of 1365 bags of linseed, indorsed by *Gillanders & Co.* in blank. He had no reason to suppose that the bill of lading was handed to him by mistake or inadvertence, and had he not called at the office of the Defendants the two documents would have been left at his office by *Henry*. The bill of exchange was duly accepted by him, and, according to his statement, he was not aware of any custom amongst merchants not to deliver bills of lading to the vendees of the goods until they had taken up their acceptances on account thereof. In reference to the policy upon the linseed *Waite* stated in his affidavit as follows:—

"I have been informed and believe that the said Defendants *Gillanders, Arbuthnot, & Co.*, had telegraphed to their agents to open a policy of insurance on linseed by a ship or ships, and I was informed by Mr. *De Menecy*, a clerk in the house of the said Defendants, *Gladstone, Ewart, & Co.*, who attends to such matters, that he had opened an insurance 'on slip' as he could not tell the exact amounts, and on subsequently applying, on the said 2nd day of November, to the said *De Menecy* for a policy effected on my goods, he said, after consulting Defendant *William McAdam Steuart*, as he informed me he had done, and which I believe, that he could not give it me, as he had other linseed for other parties insured on the same policy. I then requested Mr. *De Menecy* to cancel the policy so effected, so that I might effect a fresh policy to cover the then increased value of the linseed purchased for my account as aforesaid, the market having considerably advanced, which he also declined. I also spoke to the said *William McAdam Steuart*, as he passed through the outer office at this time, and asked why he did not give me the policy, upon which he answered, 'Why should we do so when it covers other goods?' or used words to that effect, and Mr. *De Menecy* remarked in a pleasant way, 'Do you think we have no other linseed than yours?' or used words to that effect. I then informed Mr. *De Menecy* that I should insure my own parcel of linseed myself, and that he had better

cancel the policy held by *Gladstone, Ewart, & Co.*, so far as my interest was concerned, letting it stand for such goods in the same ship as *Gladstone, Ewart, & Co.* had an interest in for other parties, and I say that I gave a clear and distinct intimation to *De Menecy* that I should open a separate policy on my said goods by the said ship *Ganges* for my own account, to which he neither then, nor at any other time, made any objection, but, on the contrary, he asked me what I thought I should have to pay, and opened and shewed to me the policy which his principals had effected as aforesaid on the said linseed, and called my attention to the office, and the rate of insurance, so as to shew what I could insure to pay particular average. Such an arrangement under such circumstances is a proper arrangement, and one of frequent occurrence in the ordinary course of business. I had not the least notion, knowledge, or belief that the said Defendants *Gladstone, Ewart, & Co.*, and the said *De Menecy*, were not aware that I held the bill of lading of the said goods, or that they had any objection to my having or holding it, and I say that, on the said 2nd of November, and after my interview with *De Menecy* on that day, I effected a policy with the *Home and Colonial Insurance Company* for the sum of £1500 on the said linseed, and handed the same to the Plaintiffs when completed, at the same time informing them that I could not obtain the policy originally effected, as the same included other goods.

"The said bill of lading was so as aforesaid handed over by me to the said Plaintiffs, as my factors, on the usual understanding that the goods therein comprised should be sold by them on their arrival for my account on the usual terms."

In reference to the statement contained in *Waite's* affidavit as to the policy, *Steuart*, one of the firm of *Gladstone, Ewart, & Co.*, in a subsequent affidavit, stated as follows:—

"Until the arrival of the ship *Ganges* with the said linseed on board, *Waite*, although he was frequently at the office of *Gladstone & Co.*, never mentioned that he had the said bill of lading, nor did he insist that he was entitled to have the policy of insurance effected on the said linseed by *Gladstone & Co.* on the ground that he had the bill of lading. The said policy covered no other goods besides the 1365 bags of linseed, as *Waite* must have very well

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known, since he inspected the said policy, as he alleges that he did in his affidavit, and he would, therefore, have been entitled to have the said policy if he was entitled to have the bill of lading. . . . When *Waite* applied to me for the policy I informed him that he could not have it unless he took up his bill."

"When an insurance has been effected on a consignment, the property in portions of which has been assigned to or vested in other persons, it is not the custom to cancel such policy as regards such portion of the consignment as may belong to, or be vested in, other persons, and (*sic*) for such persons to effect a policy in their own names, but it is usual for an assignment or declaration to be made vesting a portion of the benefit of such policy in such other persons. It is a very unusual thing to cancel a policy when the goods in respect of which it has been effected have been many weeks afloat."

Mr. *G. M. Giffard*, Q.C., and Mr. *E. Macnaghten*, for the Plaintiffs:—

The bill of lading was a complete and negotiable instrument, and the moment it passed into the hands of the Plaintiffs, to whom it was pledged for valuable consideration without notice of anything which should render it improper on the part of *Waite* to pledge it, the right of the unpaid vendors was defeated, and the Plaintiffs, as such *bonâ fide* transferees, are entitled to the goods as against them: *Lickbarrow* v. *Mason* (1). Nor will the title of the *bonâ fide* transferees for value be affected by the circumstance that the bill of lading may have been improperly or even fraudulently obtained from the vendors by the purchaser who made the transfer to them: *Pease* v. *Gloahec* (*The Marie Joseph*) (2). The contract between the parties for the purchase of the linseed being clear and unambiguous, and in terms a contract with six months' credit allowed, evidence is not admissible for the purpose of shewing that by the usage of the particular trade the vendors were not bound to deliver the goods, or the *indicia* of title, without first receiving payment: *Spartali* v. *Benecke* (3).

(1) 1 Sm. L. C. 595, 4th Ed. (2) Law Rep. 1 P. C. 219. (3) 10 C. B. 212.

Mr. *Amphlett*, Q.C., Mr. *Prendergast*, Q.C., and Mr. *Skene*, for *Gladstone, Ewart, & Co.*, and *Gillanders, Arbuthnot & Co.*:—

As unpaid vendors we are entitled to the first charge upon the goods. Although a bill of lading may in some sense be said to be a negotiable instrument, "it is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bonâ fide* transferee for valuable consideration without regard to the title of the parties who make the transfer": *Gurney* v. *Behrend* (1); and the vendee of the goods, by handing it over to a third person, can give no better or other title than he himself possessed (2).

Waite acquired possession of the bill of lading in an irregular manner, and, at all events, by accident, without any intention on the part of *Gladstone & Co.* to hand it to him, and without their knowledge; and the title of the Plaintiffs is affected by the irregularity under which *Waite* obtained possession of the bill of lading, nor is it enough for them to prove that they had become *bonâ fide* holders of the bill of lading for valuable consideration. "Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods." *Per Campbell*, C.J., in *Gurney* v. *Behrend* (3).

We adduce evidence that it is not the custom to part with the bills of lading in transactions of this kind until the acceptances have been taken up; and this custom is specially referred to during the argument in *Gurney* v. *Behrend* (4).

(1) 3 E. & B. 622, 633. 18 Jan 858

(2) See 18 & 19 Vict. c. 111, s. 1.

(3) 3 E. & B. 634. 18 Jan 858

(4) Ibid.: See the observations of *Crompton*, J., at p. 630. "The course of business which you describe was common enough a few years ago; the bill of lading was attached to the draft and sent to an agent, with directions not to part with it till the draft was accepted; and, particularly in the trade between *America* and *Liverpool*, it was common enough to insist upon retaining the bill of lading till the draft was not only accepted, but paid, or satisfactory security given that it would be ultimately paid; and questions of great nicety arose when the right so to retain it was disputed. But I always understood this to be an exceptional course, adopted only in times of peril and suspicion; while your argument assumes that it is the ordinary course of trade."

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Even if *Waite* thought that he was honestly entitled to pledge the bill of lading, which had been thus irregularly obtained, no assent to such a course was given, either by the shippers or their agents in this country; and the mere giving of the invoice or delivery order, which has not been acted upon, does not amount to a constructive delivery of the goods, nor deprive the vendor of his right of lien, even as against the claims of a *bonâ fide* purchaser from the original vendee: *McEwan* v. *Smith* (1).

In any case, the bill of lading was only one of the documents of title, and assuming that *Waite* obtained possession of it regularly, still he had not the policy of insurance, which was necessary to complete his title, and its absence ought to have put the Plaintiffs upon inquiry.

Mr. *Druce*, Q.C., and Mr. *Lindley*, for the assignees of *Waite*.

SIR W. PAGE WOOD, V.C., after stating the case, and the grounds of defence relied upon, continued:—

The Defendants in this case have failed in establishing any want of due caution on the part of the Plaintiffs, or the allegation that no *bonâ fide* advance was made, and that it was a mere matter of account between the parties. Upon this latter point we have it in evidence that a cheque for £1000 was drawn by the Plaintiffs and paid to *Waite*, so that this ground of defence is at once swept away. When *Waite* came to the Plaintiffs with the bill of lading, he was asked to produce the policy of insurance of the goods; and, according to the affidavit of the Plaintiffs, "he informed us that he would forward us the same, and we say that, to the best of our recollection and belief, he informed us, either at that time or subsequently when he handed us the policy after-mentioned, that the first policy effected included goods belonging to other parties, in which he had no interest." The reason given to them by *Waite* for not having the original policy in his possession is explained by him in his own affidavit:—[His Honour referred to the affidavit which, upon this point, is set out in the statement.] The Defendants neither denied *Waite's* statement, nor did they call *De Menecy* to contradict it, and I must therefore suppose that they did make

(1) 2 H. L. C. 309.

this excuse or apology for not having handed over to him the original policy.

But then I have been pressed very much with the observations of Lord *Campbell*, in *Gurney* v. *Behrend* (1), upon the question whether the Plaintiffs acquired any title under this bill of lading thus delivered to them by *Waite*, who got it, as Defendants contend, irregularly, and without their consent or knowledge, by a mistake on the part of their messenger. The Defendants, however, had full authority to deliver it to *Waite*, if they thought fit. It was in the hands of their servant for the purpose, and the only question is, whether by the course of trade any such custom as that stated by the Defendants—that it is the practice not to deliver the bill of lading to the intended vendee until he shall have taken up his acceptances on account thereof—has been established. So far, however, from that being the usual course, it is expressly referred to by *Crompton*, J., during the argument in *Gurney* v. *Behrend*, as being an exceptional course, only adopted in times of suspicion and peril. I can quite understand such a term being inserted in the contract if any one should be foolish enough to consent to it; but I am not at all satisfied that any such custom as that alleged by the Defendants has been established. By accepting the bill of exchange, which was made the price of the linseed, *Waite* has paid the consideration, and it is far too late for the Defendants to contend that they have not authorized him to part with the bill of lading, and that it was all a mistake. He has parted with the bill of lading in favour of the Plaintiffs, who are *bonâ fide* assignees for value; and I see no reason why it should not have been so parted with. All that it comes to is, that if the Defendants had thought over the matter, they would not have let their messenger have it in his possession.

I do not apprehend, therefore, that the case is at all brought within the dictum of Lord *Campbell*, which has been cited from *Gurney* v. *Behrend*. The parties shipping the goods from *Calcutta*, in the absence of any stipulation to the contrary, did give their agents in *England* full authority, if they thought fit, to pass over the bill of lading to the person who had accepted the bill of exchange. The bill of lading having passed to the Plaintiffs, their

(1) 3 E. & B. 622.

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title is sufficient, and they are, therefore, entitled to the relief prayed by their bill.

Solicitors: Messrs. *McLeod, Stenning, & Watney;* Messrs. *Francis & Bosanquet;* Messrs. *Treherne, Whites, & Renard.*

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DAWSON *v.* DAWSON.

Will—Settlement—Ademption—Double Portions.

By will, made in 1824, *A.* gave all his real and personal estate to trustees, upon trusts for conversion, and upon further trust after payment thereout of his debts, funeral and testamentary expenses, to divide the residue equally between such of his children as should be living at his death, and the issue of such of them as should have died in his lifetime.

Upon the marriage of his son, *B.*, in 1849 with *C.*, *A.*, by agreement of even date with the marriage settlement, agreed to pay the trustees of the settlement the yearly sum of £350 during the life of *B.*, and in case *C.* should survive *B.*, then to continue such yearly payment to the trustees of the settlement for the purposes thereof.

In 1865 *A.*, in pursuance of a family arrangement, transferred to his children, including *B.*, property in which he was jointly interested with them: *B.*'s gain under this arrangement being considerably more than the value of a perpetual annuity of £350 a year.

On the death of *A.* in 1865, the allowance to *B.* had been unpaid since 1859:—

Held, that the gift by will to *B.* of a share in *A.*'s residuary estate was adeemed *pro tanto* by the provision of £350 per annum made for him in the agreement of June, 1849, but that *B.* was entitled to payment, as a creditor of the estate, of the arrears of such allowance accrued due in *A.*'s lifetime.

SPECIAL CASE.

By will, dated the 15th of March, 1824, *Christopher Holdsworth Dawson*, the elder, devised and bequeathed all his real and personal estate except such parts thereof as should or might by that his will, or codicil thereto, be specifically disposed of, unto his two executors upon trust after payment of debts for sale and conversion, and to stand possessed of such moneys, and the securities upon which the same should be invested, upon trust for equal division among such of his children as should be living at the time of his (testator's) death, and the issue of such of them as

should have died in his lifetime leaving issue, such issue taking the shares which their respective parents would have taken if living.

Upon the marriage of his eldest son, *Christopher Henry Dawson*, with *Emma Carter*, in 1849, the testator, by an agreement of the 11th of June, 1849, of even date with the settlement, after reciting the intended marriage, and the assignment by the settlement of the wife's fortune to trustees, consisting of money and an interest in leasehold premises, and an agreement by himself to make an allowance to his son of £350 per annum, he (the said testator) thereby promised and agreed to and with the trustees of the settlement to pay yearly and every year the sum of £350 during the natural life of the said *C. H. Dawson*, the son; and in case the said *Emma Carter* should survive her intended husband, then to continue the said yearly payment to the trustees of the said settlement for the purposes thereof.

The marriage was solemnized, and the allowance of £350 per annum was paid up to the 11th June, 1859, but from that date the allowance had remained unpaid.

In 1852 Mrs. *C. H. Dawson*, the younger, upon the death of her brother without issue, became entitled to a moiety of a property in *Yorkshire* of considerable value, called the *Willow* estate.

By an indenture dated the 22nd of April, 1865, between *C. H. Dawson*, the testator, his four children, and the executors of his sisters, *Rachel* and *Mary Dawson*, after reciting that *Rachel Dawson* had died in 1859, leaving all her property to *Mary Dawson*, and that *Mary Dawson* had died in March, 1865, and had devised and bequeathed one-half of her property, real and personal, to the testator, and the other half to his children; and that *Rachel* and *Mary*, being his only two sisters, had lived with the testator for many years before their deaths, and that he had managed their property and received money on their account, but no statements of account were ever made out between him and his sisters; and that part of the residuary estate of the said *Rachel Dawson* consisted of a sum of £56,125, and other moneys in the hands of the said testator; and part of the estate of the said *Mary Dawson* consisted of the said last-mentioned sum, and also of a like sum, and other moneys in the hands of the said testator; and that such sums

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of money formed part of a larger sum of £330,000, deposited in his name in the *Bradford Old Bank, Limited;* and after reciting that the four children, parties thereto, who were entitled to half of the property of the said *Mary Dawson*, were his only children, and that it had been amicably arranged between them and him that as a matter of family arrangement no accounts whatever should be made out between him and the executors of his said sisters with respect to his management of their property, or of the moneys received by him on their account; and that in consideration of natural love and affection he should assign and transfer to them the whole of the said sum of £330,000, and all his share and interest in the residuary estate of the said *Mary Dawson*, and that his said children, and the excutors of the said *Rachel Dawson* and *Mary Dawson*, should release him from all claims and demands in respect of any moneys due from him to the estates of the said *Rachel Dawson* and *Mary Dawson* respectively, or in respect of his management of the property: It was witnessed, that in pursuance of the said agreement, and to carry the same into effect, he (the said testator) assigned unto his four children all the aforesaid sum of £330,000, and all his share in the estate of *Mary Dawson*, to hold the same unto them absolutely in equal shares, in consideration of which the children and the executors of *Rachel* and *Mary Dawson* thereby released the testator from all moneys received, or which ought to have been received, by him for or on account of the said *Rachel* and *Mary Dawson*, or either of them, and for all claims, for or in respect of the said moneys, or the management of their respective properties.

The value of the property so assigned by the testator to his four children greatly exceeded the value of their shares of their aunt's estate, and *C. H. Dawson*, the younger, received under the assignment more than the value of a perpetual annuity of £350, in addition to his share of his aunt's estate. The testator died in June, 1865, without having altered or revoked his will.

Subsequently to his death the following copy of a letter, undated, was found amongst his papers:—

"My dear *C. H. D.*,—Enclosed you have bank notes, together £175, receipt please to acknowledge. I was much surprised by a conversation I had a day or two ago with your aunt *Mary*, when she

told me you had said I had suspended your marriage allowance, and that I should continue to do so for the future. You will recollect a conversation you and I had, in which I asked if the rents had been paid. You replied, yes, they had, but you did not say into Court, but not to you. Now, finding you were not the receiver, I send you as above, and shall continue to do so until you are put into the possession of your share of the estate in dispute, and we will then try to settle the question twixt you and I, and I hope to our mutual satisfaction.—Yours affectionately,

"*C. H. D.*"

This letter was thus indorsed by the writer:—

"Copy. To *C. H. D.*, jun., with cash £175" (and in another handwriting thus:—) "on subject of his allowance, £350 per annum, last allowance paid by *C. H. D.* 1859."

The Defendant *C. H. Dawson* denied ever having received any such letter.

Questions had arisen with reference to the allowance of £350 provided by the agreement of the 11th of June, 1849; it being contended on the one hand by the children of the testator, other than *C. H. Dawson*, that the allowance had been altogether satisfied, and was not payable out of the testator's estate; that if not satisfied, it had become a charge upon *C. H. Dawson's* share; that no arrears could be claimed to any later period than the assignment of 1865, and that, at all events, the allowance terminated with the death of the testator: while on behalf of *C. H. Dawson* it was contended *contrà*, that the allowance had not been satisfied, but was still payable and formed a charge upon testator's general estate, and that the arrears were payable from the 11th of June, 1859 (the date of the last payment), up to the present time.

A special case had been agreed upon, by which the following questions were proposed:—

1. Is the allowance of £350 per annum, mentioned and provided for in and by the agreement of the 11th of June, 1849, still payable, and if not, when did it cease, and if it be still payable, out of what funds, and in what manner, should provision be made for the future payments thereof?

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2. Are any, and what, arrears of the said allowance payable, and if so, by and to whom, and out of what funds, and in what manner should the same be paid?

3. If the same allowance be still payable, will it terminate with the death of the survivor of *C. H. Dawson* and his wife, or at some other and what period?

Mr. *Willcock*, Q.C., and Mr. *G. N. Colt*, for the Plaintiffs:—

The rule of law is, that in the absence of an indication of intention to give a double portion, the child is not to have both provisions. The agreement by the testator upon the marriage of his son, *C. H. Dawson*, to allow him £350 a-year, was an advancement in the nature of a portion, and the Court will presume that the provision by the will operates as a satisfaction of the agreement, or conversely, that the share given by the will has been adeemed *pro tanto* by the provision made for *C. H. Dawson* upon his marriage: *Trimmer* v. *Bayne* (1); *Ex parte Pye* (2); *Lady Thynne* v. *Earl Glengall* (3); *Earl Durham* v. *Wharton* (4).

Mr. *J. Lorence Bird*, for the surviving trustee of the marriage settlement of 1849, contended that the gift of residue by the will was no satisfaction of the covenant entered into by the testator, by the agreement of June, 1849, with the trustees of the settlement, so far as the wife and children were concerned: *McCarogher* v. *Whieldon* (5).

[The VICE-CHANCELLOR held, that as *C. H. Dawson* was still living, the question raised by the trustee of the settlement was not ripe for decision.]

Mr. *Druce*, Q.C., and Mr. *Lindley*, for *C. H. Dawson*, the son:—

The question of double portions does not arise, as by the agreement of June, 1849, a debt due from the testator, and payable out of his estate, was created, and the will, which contains an express trust for payment of debts, does not, by giving the son a share in the residue, subject to payment of debts, operate as a satisfaction

(1) 7 Ves. 508.
(2) 18 Ibid. 140.
(3) 2 H. L. C. 131.
(4) 3 Cl. & F. 146.
(5) Law Rep. 3 Eq. 236.

of the debt: *Coventry* v. *Chichester* (1). Even assuming an annual allowance to be a portion in any sense of the term, which it is not, *Watson* v. *Watson* (2), no case is to be found in which the presumption against double portions has been applied, where what the child gets under the will is a share of the residue subject to the payment of debts: and it has been expressly held that a contingent legacy is no satisfaction of a vested portion: *Bellasis* v. *Uthwatt* (3).

In *Lady Thynne* v. *Earl Glengall* (4), where the settlement preceded the will, the case was one of election and not of satisfaction, as observed in Lord *Romilly's* judgment in *Coventry* v. *Chichester* (5), and if we are right in our contention that the agreement constituted a debt to the trustees, that case is a direct authority that the gift of a part of the residue cannot be considered as a satisfaction, as is clearly put in the judgment of Lord *Chelmsford* (6). *Earl Durham* v. *Wharton* (7) turned entirely upon the particular words used.

Mr. *Willcock*, in reply.

Aug. 2. SIR W. PAGE WOOD, V.C.:—

But for the case of *Coventry* v. *Chichester* I should have had no doubt that the provision, which was made on the marriage of the son, and clearly intended, therefore, as far as it went, as an advancement to the son in the nature of a portion, would have been an ademption *pro tanto* of the provision previously made by will, notwithstanding the direction that in the event of the son dying in the lifetime of the testator, it should go to the issue, in which case the son would not take. I was referred, however, to *Coventry* v. *Chichester*, and that case has caused me to go very anxiously through the anterior and subsequent cases. The Court of Appeal there differed in opinion. It was not the case of an ademption of a legacy previously given; but the question was,

(1) Law Rep. 2 H. L. 71; 2 D. J. & S. 336; 2 H & M. 149, 10 Jur. N.S. 435, 896
(2) 33 Beav. 574.
(3) 1 Atk. 426.
(4) 2 H. L. C. 131.
(5) Law Rep. 2 H. L. 93.
(6) Ibid. 85.
(7) 3 Cl. & F. 146.

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whether or not a portion provided by the settlement, and constituting a debt, was, under the special circumstances of the case, satisfied by a provision in the will—as to which there seems to have been some difference of opinion in the two Courts. Lord Justice *Turner* considered it to be in itself a portion. That he stated most positively and distinctly (1); but though a portion, he considered it was not in any sense a satisfaction of the previous portion which had been given, regard being had especially—and in that point he was followed by the House of Lords—to the provision contained in the will, that all debts and legacies should be paid and satisfied; and the provision being in the form of a bond payable within three months after demand, of course it constituted a debt on the testator's estate.

I should have the greatest difficulty, I am sure, in at any time differing from that most highly respected Judge, whose loss I, for one, cannot too deeply deplore; and that opinion having been followed by a decision of the House of Lords, it is entirely conclusive as regards any case so circumstanced as that of *Coventry* v. *Chichester* (2). I do not mean in any way to narrow the effect of that decision when I say "so circumstanced," but I especially refer to that case, in which there was a previous engagement to pay, and a subsequent provision by will directing all debts to be paid, because all their Lordships who decided that case in the House of Lords relied very much on the difference between the case where, by previous provision in a settlement, a debt is constituted, and the case of ademption by a subsequent grant by a testator (whether in the form of an absolute gift, or by covenant or engagement). In *Coventry* v. *Chichester* Lord Justice *Turner* says (1):—"I agree in opinion with my learned brother and the Vice-Chancellor, that the benefit given by the will to Lady *John Chichester* in the moiety of the testator's residuary estate ought to be considered as a portion, for she takes, by means of the powers of appointment vested in her, the whole dominion over that moiety, and I do not think that the introduction into the will of the ultimate limitation in favour of Mr. *Bevan*, dependent as it is upon the non-exercise, not only of the powers given to Lady *John Chichester*, but also of

(1) 2 D. J. & S. 344.

(2) Law Rep. 2 H. L. 71; 2 D. J. & S. 336.

the powers given to Mrs. *Paul*, can be taken to alter the character of the benefit given to Lady *John Chichester*."

Then he states that he does not agree with the opinion which he says I appear to have expressed:—"that in cases of provisions made for children by different instruments, the fact that the provision made by each of the instruments is in the nature of a portion is of itself sufficient to disentitle the children to the benefit of both the provisions."

I have looked through my judgment, and I cannot see on what that remark was founded: certainly I had no intention of laying down any rule of that kind. I always supposed that the two instruments must be looked to, and that the presumption always was (and I apprehend the state of the law has not been altered), that where there was a second provision for the child, only one provision was intended for that child in the way of portion; but that presumption, like every other, is to be rebutted, not only by what is found in the instrument, but by external circumstances and by parol evidence contemporary with the transaction in question.

The Lord Justice then says:—"The Court, no doubt, leans against double portions, and slight differences in the mode in which different provisions are made are not sufficient to overcome that leaning; but if the instruments shew, or it can otherwise by admissible evidence be shewn, that both the provisions were intended to take effect, I know no rule of this Court to prevent them from doing so." Certainly, I should never have thought of saying anything to the contrary of that proposition. The Lord Justice continues: "Cases of this nature resolve themselves, as it seems to me, into two points. First, whether the provisions made by the different instruments are to be considered as portions; and, secondly, whether if they are to be so considered, it was or was not intended that both the provisions should take effect, regard being had, in the consideration of this latter question, to the leaning of this Court against double portions, which must prevail unless there be strong and clear proof of a contrary intention." That, I apprehend, does bring back the rule to what I stated, that the presumption is against double portions unless there is clear and strong proof of the contrary being intended. Then the Lord Justice, after proceeding to point out differences in the arrange-

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ments, says:—"Beyond this there is in this will a trust for payment of debts and legacies, preceding the trust for the division of the residue into moieties, and the testator must have known that under this trust for payment of debts the £10,000 secured by the covenant would be payable, as he had been paying interest upon it. The case, therefore, is in substance this, that by the very instrument by which one of those portions is created, the other of them is directed to be paid; and it is, I think, going too far to apply the rule against double portions in a case so circumstanced."

In the House of Lords nearly every one seems to have relied on that circumstance of the direction for payment of debts. This provision being, as they say, a debt, and there being a direction for payment of debts by the subsequent will, they conceived that the rule against double portions was obviated. That seems to have been the principal ground of the decision. Undoubtedly, also, they thought that there were differences in the provisions. The Lord Chancellor threw out this remark, and it occasioned me some doubt as to whether the general rule was intended to be altered; though, looking to all that was said by Lord Justice *Turner*, and their Lordships, I do not think that could have been the intent: "It is certainly easier to arrive at a conclusion as to that intention where the will precedes the settlement, than where he settlementt is first and the will follows. In the case where the revocable instrument is first, and a portion is given by it, if the event of marriage, or any other occasion for advancing a child, should afterwards occur, it may very reasonably be supposed that the parent has anticipated the benefit provided by the will, and has intended to substitute for it the new provision, either entirely or *pro tanto*." That is to say that there shall not be a double portion. "But where an irrevocable settlement is followed by a will, it is not so easy to infer that an additional benefit was not intended by the testator, except where he expressly declares his intention to be otherwise, or where the gift in the will and the portion in the settlement so closely resemble one another as to lead to a reasonable intendment that the one was meant to be substituted for the other."

That is the only part that seemed to me to be doubtful, because in *Lady Thynne* v. *Earl Glengall* (1) that was not required. The

(1) 2 H. L. C. 131.

presumption is that he does intend it, unless he expressly declares, by something which shews clearly his intention, that he does not intend a satisfaction. Here the presumption would seem rather to be inverted. In the case put by the Lord Chancellor, where the settlement precedes the will, he says it is difficult to suppose it unless the previous instrument expressly declares that the two shall not hold together. But I think, looking to the other observations of their Lordships and of the Lord Justice, that could hardly have been intended to its full extent. I think, however, after that case it will be exceedingly difficult to hold that any subsequent provision by will, after a covenant or engagement by bond in a previous instrument, will be a satisfaction of the debt contained in the previous instrument, because there are so very few wills in which there is not a direction to pay debts, that the case of course would seldom happen.

I am not prepared to say that it might not have been wise if the rule had never been applied at all in a case where the settlement is anterior to the will, as the testator might well be said to know what he had done; and having made a subsequent provision, he might by that alone have meant to indicate his intention that both should take effect. Neither, however, in the Court below, nor in the House of Lords, was it put upon that ground, as to have said so would have been directly to overrule *Lady Thynne* v. *Earl Glengall* (1); but the decision was rested on the provision to pay debts and legacies. I have had the will in Lord *Glengall's* case looked at, because, the property being very large, it struck me as very peculiar that there should be no provision for the payment of debts there. In looking at it, however, one finds that it was not in form a will, but instructions for a will. They were drawn up hastily, and evidently shortly before Mr. *Mellish's* death, and the instructions were proved as a will. That accounts for there being no provision for the payment of debts; therefore *Lady Thynne* v. *Earl Glengall* consists, as otherwise it could hardly have done, with *Coventry* v. *Chichester* (2).

I have looked through a number of authorities, and *Coventry* v. *Chichester* is the very first case where I have found it held that a

(1) 2 H. L. C. 131.

(2) Law Rep. 2 H. L. 71; 2 D. J. & S. 336; 2 H. & M. 149.

10 Jur NS 435 896.

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direction for the payment of debts and legacies shall have any effect upon the antecedent portion, which was given by the provision made on marriage. I am bound to say I have not found a case to the contrary, and it may be that only of late years cases have arisen, as in *Lady Thynne* v. *Earl Glengall* (1), where the settlement has been anterior to the provision by will. As regards previous wills, *Trimmer* v. *Bayne* (2) is a direct authority that a direction to pay debts and legacies in a previous will has no effect upon a subsequent settlement made by bond. In that case there was a direction in the will for payment of debts and legacies, and a subsequent settlement made by bond, and the question was, whether the legacy was adeemed by the provision contained in the subsequent instrument. It was there held, in favour of the residuary legatee, notwithstanding the direction for payment of debts and legacies, that the legacy was adeemed by the subsequent provision made by bond, and the case is a clear and express authority to that effect. The authorities in which a direction to pay debts and legacies has been held to prevent the application of the rule of satisfaction of a debt are numerous. In the case of a legacy to a creditor, the Court, having apparently first laid down the rule that a man should be just before he is generous, and that the testator intended payment and not a benefit, endeavoured by every sort of device to escape from that rule, and has held a direction to pay debts and legacies to be an indication that both shall be paid. In a recent case before me (3), I held a direction to pay debts alone not to be sufficient to rebut the presumption of satisfaction, but the Master of the Rolls, in two or three subsequent cases, has held that the direction to pay debts standing alone will suffice to prevent satisfaction, as in *Cole* v. *Willard* (4); *Pinchin* v. *Simms* (5).

According to all the authorities, children's portions stand on a totally different principle from other debts, in reference to satisfaction. As in the *Statute of Distributions*, where there is an express provision against double portions (6), so in all these decisions with reference to the question of satisfaction or ademption of legacies, where a portion is also given, and both provisions are in the nature

(1) 2 H. L. C. 131.
(2) 7 Ves. 508.
(3) *Edmunds* v. *Low*, 3 K. & J. 318, 321.
(4) 25 Beav. 568, 4 Jur. N.S. 90
(5) 30 Ibid. 119.
(6) 22 & 23 Car. 2, c. 10, s. 5.

3 Jur. N.S. 508

of a portion, it has been held that a double portion was not intended. They seem taken out of the case, as to satisfaction of debts, in many ways. First, the question of ademption would not arise as to a debt. It has always been held that a previous legacy is no satisfaction of a subsequent debt, because there could be no intention of satisfying that which had not yet accrued. With respect to portions it is exactly the reverse. There the legacy is taken away by the subsequent engagement (debt). In numerous cases there are small differences, as they are called (though I cannot help thinking they are rather large in *Earl Durham* v. *Wharton* (1) and in *Lady Thynne* v. *Earl Glengall* (2)), which prevent the question of satisfaction arising.

The case now before me seems to be identical with *Trimmer* v. *Bayne* (3), as there is a provision in a previous will for this son, indicating an intended equality between all the children. The son marries, and the father, as it seems not to have been convenient to make a payment down, agrees that he will pay an annuity during the son's life, and if the wife should survive will continue it, and pay it to the trustees of the settlement upon the trusts of it. The question whether the annuity is perpetual is not ripe for decision, as the son is alive. All that we have to deal with is, whether the annuity continues to be payable to the son, and whether the arrears which have accrued in respect of it are payable. Finding, then, that by his will the testator has made a very much larger provision than this annuity, and that the annuity, or engagement to pay, contracted after the date of that will, is distinctly by way of portion on the marriage of his son, the case is on all fours with *Trimmer* v. *Bayne*, and not to be affected in any way by *Coventry* v. *Chichester* (4), and that class of cases, where the anterior debt having been created, the Court has been of opinion that the subsequent provision made in the shape of portion, where debts have been directed to be paid, is not to be construed as a satisfaction of the anterior debt. Unless all the previous authorities with reference to ademption can be overruled, I have no right to say that the provision here made is not *pro tanto* an ademption of the provisions given by the will. Of course, as the provision

(1) 3 Cl. & F. 146. (2) 2 H. L. C. 131. (3) 7 Ves. 508.
(4) Law Rep. 2 H. L. 71; 2 D. J. & S. 336; 2 H & M. 149.

V.-C. W. 1867 DAWSON v. DAWSON.

given by the will is much greater in every way, the provision by will must be taken and the annuity will be dropped. Therefore I answer the first question in the negative—it is not payable. The answer to the second question will be, that the arrears are payable up to the date of testator's death out of his personal estate. The third question I decline to answer, because the time for so doing has not arrived.

Some discussion then ensued as to obtaining the declaration of the Court upon the third question, and *Bell* v. *Cade* (1) was referred to. His Honour refused to make a prospective declaration, and it was ultimately arranged that question three should be amended by framing it in this form :—

"Is the testator's residuary estate now divisible, or should any provision be made out of the same in respect of such allowance?"

Ravenscroft v. *Jones* (2) was mentioned upon this point.

Aug. 3. The VICE-CHANCELLOR said that the Master of the Rolls, in *Ravenscroft* v. *Jones*, had expressly distinguished between the case of a mere gift of money *simpliciter*, upon the marriage of a child, and that of money paid in performance of a promise made before the marriage, or under the provisions of a marriage settlement. In this case the money was agreed to be paid by an instrument of even date with the settlement; and, as Lord *Eldon* observed in *Trimmer* v. *Bayne* (3), "the rule is settled that where a parent, or a person *in loco parentis*, gives a legacy as a portion, and afterwards upon marriage, or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will," and the Court will presume he meant to satisfy the one by the other.

One answer would be given to the three questions in this form, viz., that the gift by will to *C. H. Dawson*, son of the testator, of a share of the residuary estate was adeemed *pro tanto*, by the provision made by the testator for his said son and his family, on his marriage, by the agreement of the 11th of June, 1849. Provision

(1) 2 J. & H. 122. (2) 32 Beav. 669. (3) 7 Ves. 515.

should be made out of such share of residue for performance of the said agreement, by setting apart by the executors a sum in consols sufficient to produce £350 per annum. *C. H. Dawson* would be entitled to the income of the share so set apart during his life, and entitled to be paid, as a creditor of the estate, the arrears of the annuity accrued due in the life of the testator.

Solicitors: *R. & W. B. Smith.*

NEVIN *v.* DRYSDALE.

Will—Ademption.

Testator, by will, dated April, 1864, bequeathed £500 to his daughter in case she should marry, and directed that the same should be paid to her on the day of her marriage, or as soon after as conveniently might be. The daughter married in September, 1864, and in the November following the testator gave the husband £400 towards the expenses of furnishing. He afterwards promised a further sum of £600, but died before carrying out this promise:—

Held, that the presumption that the legacy of £500 had been *pro tanto* ademeed by the gift of £400, was not rebutted by the subsequent unfulfilled promise of a further gift.

WILLIAM MILNER, by his will, dated the 29th of April, 1864, bequeathed £100 to his daughter, *Susannah Sarah Milner*, to be paid within a month after his death, and in case his said daughter should marry, he gave her a further sum of £500, and directed that the same should be paid to her on the day of her marriage, immediately following the solemnisation of such marriage, or as soon after as conveniently might be.

The testator directed his residuary estate to be divided into five equal parts. Three of these fifths were to be held by the trustees upon trust, as to part thereof, for his son, *Albert John Milner*, absolutely, and as to the other part for him during his life, and after his death for his child or children. The remaining two-fifths were to be held by the trustees upon trusts for the benefit of testator's said daughter, *Susannah Sarah Milner*, for her life, with remainder to her child or children. The will contained cross-

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executory trusts in the event of the testator's son or daughter dying without leaving a child who should become absolutely entitled under the will to his or her share.

The testator died on the 2nd of February, 1865.

On the 28th of September, 1864, his daughter married the Defendant *Drysdale*.

It appeared that previously to the marriage *Drysdale* had been living with his mother, and had scarcely any household furniture of his own, and in contemplation of the marriage it was arranged between him and the testator that he should take and furnish a house for himself and wife. This he did, at an expense of about £2000, and on the understanding—supported by what was stated by the testator's wife and daughter—that the testator had promised, and was willing, to assist in paying for the furniture. *Drysdale* applied to him after the marriage, and on the 7th of November, 1864, received £400 from him, which he (testator) stated to his own wife and to Mr. and Mrs. *Drysdale* was given towards paying for the furniture. Very shortly before the testator's death *Drysdale* again applied to him for further assistance towards the expense of the furniture. The testator promised to give a further sum of £600, but he died suddenly on the 2nd of February, 1864, without having performed his promise. Up to the time of testator's death *Drysdale* had no knowledge that a legacy of £500 was given to his wife by her father's will. No settlement in any way affecting this legacy was made upon the marriage.

Mrs. *Drysdale* died in July, 1865.

The present suit was instituted by the trustees of the will for the purpose of administering the testator's estate, and the cause now came on for hearing upon further consideration, the only question for discussion being, whether the legacy of £500 had been *pro tanto* adeemed by the gift of £400 made to the son-in-law after the marriage.

Mr. *W. M. James*, Q.C., and Mr. *Buchanan*, for Plaintiffs, the trustees.

Mr. *J. T. Humphry*, for parties interested in the residue, contended that the advance of £400 was, *pro tanto*, a satisfaction of the legacy to testator's daughter, and that the presumption of satis-

faction was not rebutted by the subsequent promise to give £600 in addition: *Ferris* v. *Goodburn* (1).

Mr. *G. M. Giffard*, Q.C., and Mr. *Royle*, for Mr. *Drysdale*, husband of testator's daughter:—

The gift to the husband of £400 after marriage was no ademption of the legacy to the wife. But even if the presumption of satisfaction can be said to have arisen upon the first gift, that presumption is rebutted by the subsequent promise made by the testator to his son-in-law, which clearly shews that the testator did not intend to limit his bounty to the provision made for his daughter by will: *Robinson* v. *Whitley* (2); *Ravenscroft* v. *Jones* (3).

SIR W. PAGE WOOD, V.C.:—

The question in this case is, whether or not the legacy of £500 given to Mrs. *Drysdale* by the testator's will has been adeemed or satisfied *pro tanto* by the subsequent payment of £400 to her husband. The scheme of the testator's will was to divide his property between his son and his daughter. A larger portion of the residue was given to the son, as the testator, considering that his daughter might want ready money after his death, had given her £100, payable within one month after that event, and also a legacy of £500, to be paid to her upon her marriage. The will was dated in April, 1864, only a few months before the marriage of his daughter, which took place in September, 1864. Previously to that marriage it was arranged with the testator that the intended husband should take a house and furnish it, on the understanding that the testator would contribute towards the expense, which he accordingly did by advancing £400 for that purpose. There can be no doubt that the legacy of £500 being given by the testator to his daughter on her marriage was in the nature of a portion, and the authorities, of which *Lady Thynne* v. *Earl of Glengall* (4) is a leading instance, being very strong against double portions, even where there are great differences in the character of the gifts, there is, so far, a clear presumption that

(1) 27 L. J. (Ch.) 574. 4 Jur. N.S. 847
(2) 9 Ves. 577.
(3) 32 Beav. 669.
(4) 2 H. L. C. 131.

V.-C. W. 1867 NEVIN v. DRYSDALE.

the gift of £400 was in satisfaction of the legacy, and intended as a part payment of the daughter's portion. What took place afterwards was, however, important. The testator promised a further sum of £600 towards the furniture, but died before giving the money. It has been contended that the presumption of satisfaction which would otherwise have arisen is rebutted by this subsequent promise, and that the testator cannot be taken to have intended that if he died before giving the £600 the legacy of £500 was not to be paid in its entirety, but was to be reduced by the amount of the £400 already paid. That, however, is not, as it appears to me, a sound contention. We must look at the case as it stood at the time of the original gift. The testator did not then promise to give £1000, but only to give something. He gave £400, and on that gift the presumption of law arose that the legacy of £500 was *pro tanto* adeemed by it. Is, then, that presumption rebutted, and the whole arrangement, so to speak, recast by reason of this subsequent promise? I think not, nor do I know of any rule of law which will authorize the Court in saying that a mere naked promise of additional help made after the presumption of satisfaction has arisen, can rebut the inference of law that there has been a prior satisfaction of the original legacy. This subsequent promise was a mere promise which the testator was prevented by his death from fulfilling, and it cannot affect the question of ademption. There must, therefore, be a declaration that the legacy of £500 was *pro tanto* satisfied by the subsequent gift of £400.

Solicitors: Messrs. *Lever & Son*; Mr. *W. Royle.*

FISK *v.* ATTORNEY-GENERAL.

V.-C. W.
1867
July 1, 12.

Will—Mortmain—Ascertainment of Residue, after providing for illegal Object—Legacy to a Charity which has ceased to exist.

Testatrix gave the capital of £1000 consols to the rector and churchwardens of a parish and their successors, upon trust to apply such of the dividends thereof as should "from time to time be necessary or required, in keeping in repair" her family grave; and to pay and divide "the residue of the said dividends," at Christmas every year for ever, amongst the aged poor of the parish:—

Held, that though the amount of gift for the repair of the grave was not specified, the Court could, if necessary, have estimated the amount "necessary and required" for the purpose; and so have prevented the gift of the residue from being void for uncertainty.

Observations on *Chapman* v. *Brown* (1):

Held, further, that as there was a prior gift of the whole fund to the rector and churchwardens, the gift to the poor did not fail by reason of its being a bequest of a residue, after a void bequest; and that there was a good gift of the whole to the charity, discharged from the obligation to repair the grave.

Testatrix gave a legacy to a charitable institution which was dissolved in her lifetime:—

Held, that the legacy lapsed, and fell into the residue, and could not be applied *cy près*.

ELLEN BOLTON, spinster, by her will, dated the 20th of July, 1853, gave the capital of £1000 consols as follows:—

"Unto the rector, or other incumbent, and churchwardens of *St. James's Church*, at *Liverpool*, and their successors, upon trust, nevertheless, to receive and take the dividends and annual proceeds thereof, and apply such part thereof as shall from time to time be necessary or required, in keeping in repair my family grave, and the brick and stone work over the same, situate on the north side of the churchyard of the same church, and inscribed with the names of *Thomas Bolton* and Miss *Alice Bolton*, and to pay or divide the residue of the said dividends and annual proceeds, at Christmas in every year for ever, to or amongst the aged poor of the parish or district of *St. James*, who shall be in the habit of attending the church of *St. James*. And I declare that the selection of the objects to or amongst whom, and the proportions in

(1) 6 Ves. 404.

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which, the said payments or division shall be made, shall rest entirely with, and be in the discretion of, the rector, or incumbent, and churchwardens for the time being of the said church."

Testatrix also gave £1000 consols to "the treasurer for the time being of the *Ladies' Benevolent Society*, at *Liverpool*, to be by him held and applied as part of the ordinary funds of the said society."

Testatrix gave numerous other legacies; and by a third codicil, dated the 6th of March, 1863, she bequeathed the residue of her estate to "the *Liverpool Lying-in Hospital*, the *Liverpool Female Orphan Asylum*, and the *Liverpool Governesses' Institution*."

By a fourth codicil, dated the 6th of March, 1863, after referring to the gift in her will of £1000 consols to the rector or other incumbent, and churchwardens of *St. James's Church* at *Liverpool*, and their successors, she directed that out of the annual dividends and proceeds thereof the sum of £5 should be paid annually to the rector or other incumbent for a sermon or lecture which the testatrix wished to be delivered in the said church to the poor, on the occasion of the distribution of the annual dividends and proceeds of the said sum of £1000.

Testatrix died on the 1st of March, 1866.

The *Ladies' Benevolent Society of Liverpool*, in the year 1864, was dissolved and brought to a close.

The bill was filed by the trustees and executors of Miss *Bolton's* will for administration, the Defendants being the Attorney-General, the *Liverpool Lying-in Hospital*, and the *Liverpool Female Orphan Asylum*; and the following questions arose:—

As to the legacy of £1000 consols, whether, the gift for the repair of the grave being void, the fund that would be necessary or required for that purpose could be ascertained by inquiry, and the residue be held to go to the poor of the parish of *St. James* or whether, that fund not being ascertainable, the whole gift failed; or, thirdly, whether the poor of the parish would take the whole fund, undiminished in respect of the gift which was void?

As to the legacy to the *Ladies' Benevolent Society*, whether it lapsed, or whether it was applicable to a charitable purpose *cy près?*

Mr. *G. M. Giffard*, Q.C., and Mr. *B. B. Rogers*, for the Plaintiffs.

Mr. *W. M. James*, Q.C., and Mr. *Bockett*, for the rector and churchwardens, as representing the poor of *St. James's* :—

We contend this is a gift of a whole fund, charged with a portion which is void, and fails, leaving a good gift of the whole.

The question in this class of cases has always been: Is it a gift of residue, after a void gift? or is it a gift of a whole, charged with a gift that fails? The authorities are: *Falkner* v. *Butler* (1); *Hoare* v. *Osborne* (2); *In re Harries' Trusts* (3); *In re Jeaffreson's Trusts* (4); *In re Rigby's Trusts* (5); *Lloyd* v. *Lloyd* (6).

Mr. *Bardswell*, for the three charities who were residuary legatees:—

Where there is a gift for a void purpose, the gift of the surplus also fails for uncertainty: *Chapman* v. *Brown* (7); *Fowler* v. *Fowler* (8).

The gift to the institution that came to an end in the testatrix's lifetime must, upon the authorities, be treated as a lapsed legacy: *Jarman* on Wills (9) and the cases there cited.

Mr. *Wickens*, for the Attorney-General:—

The gift to the *Ladies' Benevolent Society* is applicable to charitable purposes *cy-près*, although the society came to an end in the testatrix's lifetime. If there be a gift to a charitable institution, and that institution be destroyed, the gift does not necessarily fail.

It is admitted that where a general charitable purpose is sufficiently defined, if the object fail the gift will be applied *cy-près*. If there be a gift to a society, the purposes of which cannot be ascertained, that is one thing—but if the purposes can be ascertained, and are found to be charitable, what distinction in principle can be drawn between a gift to a particular object with a general charitable intent, where the object fails, and a gift to a particular charitable object which fails? *Loscombe* v. *Wintringham* (10).

[The VICE-CHANCELLOR:—In that case there never had been such a society as that to which the gift was made.]

(1) Amb. 514.
(2) Law Rep. 1 Eq. 585.
(3) Joh. 199.
(4) Law Rep. 2 Eq. 276, 283.
(5) V.-C. K. 16 Nov. 1866.
(6) 4 Beav. 231.
(7) 6 Ves. 404.
(8) 33 Beav. 616.
(9) 3rd Ed. vol. i. p. 224 (*h*).
(10) 13 Beav. 87.

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The decision in *Clark* v. *Taylor* (1) was founded on this, that the charity was private, and not public.

Upon the authority of *Henchman* v. *Attorney-General* (2), I am entitled to say that, if there be a gift to one in trust for another, and the donee fails, the gift is good. If so, the principle applies to the case of a legacy, which must be treated as if the testatrix had devoted this fund to a public charity, for purely charitable purposes.

Mr. *James*, in reply, on the first point:—

Between *Chapman* v. *Brown*, before Sir *W. Grant*, in 1801, and *Mitford* v. *Reynolds* (3), before Lord *Lyndhurst*, and other modern cases, there is a direct conflict of authority.

Mr. *Bardswell*, in reply, on the second point.

July 12. SIR W. PAGE WOOD, V.C., after stating how the two questions had arisen, continued:—

It was contended on behalf of the rector and churchwardens, that they were entitled to receive the whole fund, the trusts of part being such as the Court must disregard, and that the whole fund was theirs free of the void charge; and I think, upon the whole, that that is the sound construction of the will. The gift is not to the executors to do certain things, and pay the residue to the rector and churchwardens; the gift is out-and-out to the rector and churchwardens, and then there is a gift of a portion for a purpose which fails. It is obvious that the sum which would be required to keep the grave in repair, would be very small as compared with the annual dividends of the fund, which were intended to go to the relief of the aged poor, especially as the repairs were not to be made even annually, but only "from time to time."

5 Ch D 738

In *Ford* v. *Fowler* (4), the Master of the Rolls held that there being certainty as to that which was in the testator's power, the trust as to that did not fail, by reason of the testator having

(1) 1 Drew. 642.
(2) 3 My. & K. 485.
(3) 1 Ph. 185.
(4) 3 Beav. 146.

expressed a wish to deal with something over which he had no power; and I conceive that *Mitford* v. *Reynolds* (1) was ultimately determined upon a similar ground.

In *Mitford* v. *Reynolds* a testator had directed the purchase of a particular piece of land, and the construction of a family vault and monument, the expense of which purchase and construction was to be provided for from his surplus property, after payment of legacies. The Vice-Chancellor of *England*, Sir *Lancelot Shadwell*, having held that the trust which failed fell into the residue, Lord Chancellor *Lyndhurst* (2) reserved the question as to the validity of the bequest for the monument, and directed an inquiry as to what sum would be required for the purchase of the land and the construction of the monument in the terms of the gift; and ultimately (3) the case rested upon the original decision that the void gift had fallen into the residue.

Now, although I may be disposed to consider the charge in this case as of trifling amount, yet it must be decided upon principle, and the reason why I delayed giving judgment was, because this branch of the argument has become of some importance and interest with reference to the decision in *Chapman* v. *Brown* (4). Following that authority, it was argued not only that the rector and churchwardens did not take the void charge, but that they did not take the fund at all; that as the amount necessary for the prior object could not be ascertained, the rest of the gift must fail for uncertainty.

When the case was being argued I had a recollection of a decision, which, after some trouble, I have found, after which I must hold that the authority of *Chapman* v. *Brown* cannot prevail, except in exactly similar circumstances—I mean the decision of the House of Lords in *The Magistrates of Dundee* v. *Morris* (5).

The exact point discussed in that case which is applicable to the present was this, whether the Court will refuse to execute a trust for a charitable purpose, "on the ground (6) of the amount of the fund to be appropriated to answer the bequest not having been specified by the testator, and not being clearly ascertainable."

(1) 1 Ph. 185.
(2) Ibid. 199.
(3) 16 Sim. 105.
(4) 6 Ves. 404.
(5) 3 Macq. 134.
(6) Ibid. 157.

V.-C. W. 1867 FISK v. ATTORNEY-GENERAL.

In *Chapman* v. *Brown* (1) the trust was "for the purpose of building or purchasing a chapel," and "if any surplus should remain," the same was to go "towards the support of a minister, not to exceed the sum of £20 a year." The bequest for building the chapel was held to be void, and the bequest of the residue was held to be void also, because it was impossible to ascertain how much would remain after taking out what was required for the chapel.

5 Ch D 738

The case of *Chapman* v. *Brown* was not cited to the House of Lords in *The Magistrates of Dundee* v. *Morris* (2), but, happening to see one of the noble Lords who heard that case argued, which was an extremely singular one, it occurred to me to mention the case of *Chapman* v. *Brown*, which I find referred to by the present (and then) Lord Chancellor in his judgment. In *Scotland* it was held, as too clear for argument, that the whole gift contained in the testamentary writings in the cause must be void. But the House of Lords, notwithstanding, decided to the contrary. The testator, by his will, which consisted of several documents scratched through and altered in many places, expressed a wish to establish in the town of *Dundee* a hospital, to be managed like *Heriot's Hospital* in *Edinburgh*, the inhabitants born and educated in *Dundee* to have the preference of the towns of *Forfar*, *Arbroath*, and *Montrose*, but inhabitants of any other county or town were excluded. Then, by a subsequent writing, he expressed a wish that only 100 boys should be admitted to the hospital, and that the structure should be less than than that of *Heriot's Hospital*. It was argued by the Lord Advocate (Mr. *Inglis*), and Sir *Roundell Palmer*, that here there was no disposition of residue, and that it was impossible to collect what sum was to be raised for the establishment of the hospital. But the Lord Chancellor (Lord *Chelmsford*) says this (3): "But it was strongly urged upon your Lordships in the course of the argument that the testator had not specified any certain sum, nor furnished any means for rendering certain how much was to be applied to the establishment of the hospital. Upon this subject your Lordships were pressed with the authority of cases where bequests to charities were held to be void, on the ground of the amount of the fund to be appropriated to answer the bequest not having been

(1) 6 Ves. 404. (2) 3 Macq. 134.
(3) 3 Macq. 157.

specified by the testator, and not being ascertainable. Such was the case of *Chapman* v. *Brown* (1)," and his Lordship describes that case. Then he observes: "The Master of the Rolls (Sir *William Grant*) said, that, 'Standing by itself, a bequest of a residue to be employed in such charitable purposes as the executors shall think proper, is a good bequest.' But then he held that the bequest of the residue was void, because it was impossible to ascertain how much would remain after taking out what was required for the chapel," the point being, that it was uncertain what the amount of the residue would be. Then, the Lord Chancellor refers to the case of *Mitford* v. *Reynolds* (2), and, after stating what Lord *Lyndhurst* said, continues: "These observations of the Lord Chancellor seem to be closely applicable to this case. Here, the place of the hospital is defined, the town of *Dundee*. The size, also, of the hospital can be easily ascertained." Lord *Cranworth* makes some similar remarks, and then Lord *Wensleydale* says (3): "It depends wholly on the words undeleted by him. Whatever has been purposely deleted is undoubtedly deprived of all testamentary effect." He thinks it clear that there was intended to be established a "hospital" in *Dundee* for boys, and he observes "The word 'hospital,' according to the meaning of the word (I believe in *Scotland* it has a more definite meaning) as given by *Johnson*, *Webster*, and *Richardson*, means a building for the reception of the sick and others, who are poor." He comes, at last, to the conclusion that it is to be for 100 boys. Lord *Cranworth* had discovered the same intention, and, further, found that a building was to be provided in which boys were to be lodged and maintained. The result was, that their Lordships were of opinion that the will furnished a sufficient means of ascertaining the amount of the legacy.

Following this decision, I think I ought, in this instance (if the gift of the residue had been exclusive of the amount required for the repair of the grave) to have ascertained the amount required for the void purpose, but the better construction is, that the whole of the gift is to be taken by the rector and churchwardens.

Then there is the other point which was argued by Mr. *Wickens*,

(1) 6 Ves. 404. (2) 1 Ph. 185.
(3) 3 Macq. 169.

V.-C. W. 1867 FISK v. ATTORNEY-GENERAL.

as to the gift to the charity which no longer exists. I am far from saying that that argument may not some day or other require further consideration; but there are two decisions, one by Vice-Chancellor *Kindersley*, of *Clark* v. *Taylor* (1), the other by Vice-Chancellor *Stuart*, of *Russell* v. *Kellett* (2), which expressly decide, that when a gift is made by will to a charity which has expired, it is as much a lapse as a gift to an individual who has expired. The contrary argument is, that the gift has been given to the charitable body expressly for the implied purpose of charity, the objects of which can be clearly ascertained. Then, if it is intended to benefit the objects, why, it is said, should they be defeated, merely through failure of the channel by which they are to take the benefit? But a great deal may be said about the prospect of a conflict between rival charities, and the risk of the Court giving to charity *A.* a fund which the testator intended to give to a rival charity *B.*, but which expired in his lifetime.

Upon the whole, I think I ought not to interfere with the settled authorities.

There will be a declaration that the legacy of £1000 given to the rector and churchwardens of *St. James, Liverpool*, is a good gift, and that they take the same discharged from the obligation of keeping in repair the family grave of the testatrix.

Also that the legacy of £1000 given to the *Ladies' Benevolent Society*, lapsed, and fell into the residue.

The stock legacies will carry dividends from the expiration of a year after the testator's death.

Solicitors for the Plaintiffs: Messrs. *Clayton & Sons.*

Solicitors for the Defendants: Messrs. *Raven & Bradley;* Mr. *P. H. Lawrence.*

(1) 1 Drew. 642. (2) 3 Sm. & Giff. 264.

VICKERS *v.* VICKERS.

V.-C. W.
1867
July 10, 26.

Specific Performance—Partnership—Option of Purchase—Stock to be valued "in the usual way by two Valuers"—Refusal by the selling Partner to allow his Valuer to proceed—No Contract.

A. and *B.*, being in partnership as distillers, came to an agreement whereby *B.* was to buy out *A.*, and it was agreed that if *B.* should, during *A.*'s life, be desirous of retiring, he should give notice, and *A.* should then have an option of re-purchase, on the terms that within six months after notice by *A.*, the premises, good-will, stock in trade, and all such of the subsisting contracts as *A.* should be willing to take, should be valued "in the usual way" by two valuers, one to be named by *A.*, the other by *B.*, or by the umpire of the two valuers. *B.* gave notice of his intention to retire; whereupon *A.* gave notice of his intention to re-purchase; and two valuers were appointed; but after the appointment *B.* refused to allow his valuer to proceed with the valuation:—

Held, on the authority of *Milnes* v. *Gery* (1), and *Wilks* v. *Davis* (2), that there was no contract between the parties which the Court could specifically enforce.

THE Plaintiff, *Edward Vickers*, and the Defendant, *James Vickers*, brothers, being in partnership as distillers, the Defendant, by a deed, dated the 31st of October, 1863, agreed to buy out the Plaintiff, and in the same deed there was a provision that if the Defendant should, during the Plaintiff's life, be desirous of retiring, he should give notice, and the Plaintiff should have an option of re-purchase, on the terms that, within six months after a notice by the Plaintiff, the premises, good-will of the business, fixtures, utensils, and stock in trade, and all such subsisting contracts as the Plaintiff should be willing to take, should be valued "in the usual way by two valuers"—one to be named by the Plaintiff, the other by the Defendant, "or by the umpire of the said valuers."

Notice of intention to retire was, on the 30th of December, 1863, given by the Defendant, and, on the 30th of June, 1864, the Plaintiff gave notice of his election to purchase. The Defendant appointed a valuer, but afterwards altered his mind, and would not allow the valuation to be proceeded with.

(1) 14 Ves. 400. (2) 3 Mer. 507.

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After some negotiations which proved abortive, this bill was filed on the 23rd of May, 1865, praying for a declaration that the Plaintiff was entitled to become the purchaser of the business, and of the property connected therewith, as on and from the 30th of June, 1864, at a valuation; and that specific performance of the contract for sale and purchase of the business to and by the Plaintiff might be decreed, and that "if, and so far as might be necessary," the deed of the 31st of October, 1863, "might be rectified in accordance with the terms of the agreement in which the Plaintiff retired from the business in favour of the Defendant;" and other consequential relief.

The only question of interest was, whether the contract was one which the Court had power to enforce.

The clauses of the deed to which reference was made in the argument and judgment, were as follows:

3. (After a stipulation by *Edward* that, in case of punctual payment of the instalments of the purchase-money, he would not carry on business as a distiller within 100 miles of *London*): "Provided always, nevertheless, that in case the said business shall be disposed of by the said *James Vickers* during the lifetime of the said *Edward Vickers*, under the provision hereinafter in that behalf contained, then, and in that case, from and after the death of the said *James Vickers*, this present stipulation shall cease and be at an end; and the said *Edward Vickers* shall be at full liberty, without the necessity of any consent on the part of the said executors or administrators of the said *James Vickers*, to carry on the said business of a rectifying distiller and wine and spirit merchant, or any branches or department thereof, at his own will and pleasure . . . .

"5. In the event of the said *James Vickers* being desirous of retiring from the said business during the life of the said *Edward Vickers*, he shall give notice in writing to that effect to the said *Edward Vickers*, and the said *Edward Vickers* shall have the right of purchasing the same upon the terms hereinafter mentioned. In case, within six calendar months next after the notice in writing of the desire of the said *James Vickers* to retire, as aforesaid, shall have been given by, or on behalf of, the said *James Vickers* to the said *Edward Vickers*, or left for him at his usual or last-known

place of abode or of business in *England*, he, the said *Edward Vickers*, shall elect to purchase the same, then and in such case the premises on which the said business shall for the time being be carried on, the good-will of the trade, the fixtures, plant, utensils, and stock in trade of the said business, as on the day preceding the expiration of six calendar months next after such notice of an intention to retire being given or left as aforesaid, and also all such subsisting contracts (if any) entered into by or on behalf of the said *James Vickers*, in relation to the said business, as the said *Edward Vickers* shall be willing to take (but no others), are to be valued in the usual way by two valuers, one to be named by the said *Edward Vickers*, and the other by the said *James Vickers*, if still living, and if not, by his executors or administrators, or by the umpire of the said valuers; and the said *Edward Vickers* shall thereupon purchase and take to the said business and the aforesaid property connected therewith.

"6. In the event of the said *James Vickers* dying in the lifetime of the said *Edward Vickers*, then (unless the said *Edward Vickers* shall, during the lifetime of the said *James Vickers*, have declined to purchase the said business as aforesaid, in which case this present provision shall not take effect), the executors or administrators of the said *James Vickers* shall give up the said business to the said *Edward Vickers*, unless, within three calendar months after the death of the said *James Vickers*, the said executors or administrators shall enter into an obligation to pay to the said *Edward Vickers* an annuity of £1000 during the remainder of the life of the said *Edward Vickers*, to be paid in the same manner and on the same days of the year as the annuity hereinbefore covenanted to be paid to him, and as an uninterrupted continuation thereof. Should such executors or administrators decide on giving up the said business to the said *Edward Vickers*, the premises on which the said business shall for the time being be carried on, the good-will of trade, fixtures, plant, utensils, and the stocks in trade of the said business, as on the day preceding the expiration of three calendar months after the death of the said *James Vickers*, and also all such subsisting contracts (if any) entered into by or on behalf of the said *James Vickers*, in relation to the said business, as the said *Edward Vickers* shall

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be willing to take (but no others), are to be valued in the usual way by two valuers, one to be named by the said *Edward Vickers*, and the other by the executors or administrators of the said *James Vickers*, or by the umpire of the said valuers; and the said *Edward Vickers* shall thereupon purchase and take to the said business and the aforesaid property connected therewith. . . . "In case the said *James Vickers* shall not be carrying on the said business of a rectifying distiller and wine and spirit merchant at the time of his death, or, in case of any other reason, his executors or administrators shall be unable to make over to the said *Edward Vickers*, in manner aforesaid, the said business and the aforesaid property connected therewith, then and in any such case, unless the said *Edward Vickers* shall, during the life of the said *James Vickers*, have declined to purchase the said business as aforesaid, in which case this present provision shall not take effect, the said executors and administrators, or the estate of the said *James Vickers*, shall be bound to pay to the said *Edward Vickers*, during the then remainder of his life, the said continued annuity of £1000, by the payments and in manner aforesaid."

Mr. *W. M. James*, Q.C., Mr. *Druce*, Q.C., and Mr. *Dauney*, for the Plaintiff:—

This was a complete agreement; the contract being to sell at a fair price, "the mode of ascertainment, though it may be indicated by the contract, being subsidiary and non-essential:" *Fry* on Specific Performance (1).

Sir *W. Grant*, in *Milnes* v. *Gery* (2), points out the distinction between the class of cases where the mode of ascertaining the value is an essential part of the contract, and where it is not. In *Hall* v. *Warren* (3), the impossibility of naming arbitrators, arising from the lunacy of the vendor, was not considered an insuperable difficulty; and in *Gourlay* v. *Duke of Somerset* (4), where there was an agreement to grant a lease on such terms as *A. B.*, "and in case of his death, some other proper and competent person," should think reasonable and proper, Sir *W. Grant*, M.R., considering that the tenant had an equitable right to have

(1) Page 95.
(2) 14 Ves. 400.
(3) 9 Ves. 605.
(4) 19 Ibid. 429.

a lease, dispensed with *A. B.*, and referred it to the Master to settle the lease. In *Jackson* v. *Jackson* (1), Vice-Chancellor *Stuart* held that a stipulation that the plant and machinery were to be taken at a value to be ascertained by valuers to be appointed by the parties, was subsidiary only to an agreement for sale of land and bleach works at a fixed price.

The injustice will be monstrous if a party to an agreement is to be at liberty to defeat it by a default of his own.

Gregory v. *Mighell* (2), is an authority that the failure of arbitrators to fix the amount of rent can never affect the agreement. The word used here, no doubt, is "valuers." But in truth these persons were arbitrators. It does not follow that no case where value or compensation only is involved, is to be treated as an arbitration. Where there may be a conflict of evidence of surveyors and persons conversant with the value, and a *quasi*-judicial inquiry may be necessary, it is an arbitration: *In re Hopper* (3).

The meaning of the words "in the usual way by two valuers," is that there should be a sale and purchase upon the terms of a valuation. The valuers had first to ascertain what the plant was, then to ascertain its value. That would involve the discharge of something of a judicial function.

Sir *Roundell Palmer*, Q.C., Mr. *Kay*, Q.C., and Mr. *C. Hall*, for the Defendant:—

It is a settled rule that the Court is not to make an agreement for the parties under the pretext of specifically performing that which is not an agreement: *Milnes* v. *Gery* (4). There is nothing in this agreement to shew that the Court is at liberty to disregard the particular mode of valuation agreed upon: *Cooth* v. *Jackson* (5), *Blundell* v. *Brettargh* (6); *Darbey* v. *Whitaker* (7); *Morgan* v. *Milman* (8).

Collins v. *Collins* (9) is an authority that a "valuation" is not an "arbitration" within the *Common Law Procedure Act* (17 & 18 Vict. c. 125, s. 12).

(1) 1 Sm. & Giff. 184.
(2) 18 Ves. 328—333.
(3) Law Rep. 2 Q. B. 367, 373, 374.
(4) 14 Ves. 400.
(5) 6 Ves. 34.
(6) 17 Ibid. 232.
(7) 4 Drew. 134.
(8) 3 D. M. & G. 24, 34.
(9) 26 Beav. 306.

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In this case there is no contract for sale until the valuation has been made. The word "thereupon" means upon the valuation being made.

The same doctrine is laid down in *Gibson* v. *Goldsmid* (1), *Bos* v. *Helsham* (2), and *Tillett* v. *Charing Cross Bridge Company* (3).

If the contract be incomplete through the default of the Defendant and the Court *can* remedy the incompleteness, it will do so: *Pritchard* v. *Ovey* (4); *Paris Chocolate Company* v. *Crystal Palace Company* (5). But how is the Court to decree specific performance of such a contract as this, where the sum agreed upon is such a sum only as certain qualified persons, in whom the parties respectively have confidence, may determine?

Mr. *James*, in reply.

July 26. SIR W. PAGE WOOD, V.C.:—

The short point in this case is, whether the contract between these parties is within the principle of *Milnes* v. *Gery* (6).

[His Honour read the terms of the contract set out above, observing that all events seemed to have been provided for, except this particular event which had occurred, of one of the parties having named a valuer, and then having forbidden him to act. His Honour further observed that it had occurred to him, at one time, that more effect might be given to the previous clause about arbitration, by considering the terms of the last clause, which provided that in the event of *James's* death, the executors were either to give a bond for the due payment of the annuity, or to hand over the business. Supposing the executors refused to give a bond, then *Edward* would have to take the business; but he could only do so by paying for it at a valuation. Then supposing the executors were to do as the Defendant had done—refuse to go on with the valuation—what was to be done? But it appeared to His Honour that this consideration did not really affect the case; for that would have been a non-handing

(1) 5 D. M. & G. 757. (4) 1 Jac. & W. 396.
(2) Law Rep. 2 Ex. 72. (5) 3 Sm. & Giff. 119, 124,
(3) 26 Beav. 419. (6) 14 Ves. 400.

over of the business without any default of *Edward*, and he would then be entitled to his annuity. His Honour continued:—]

No doubt the parties did not anticipate the event which has happened. Six months were given to *James Vickers* in which to make his option; and it is clear that nothing could have been less in the minds of the parties than what has unfortunately happened; for the price to be paid by *Edward* was to be given not only for his own share, but for the share of *James* which he never owned before. It was to be a new purchase, not only of things as they stood, but of things as they might stand, after the stock had been increased or diminished by the continuance of *James's* business; and the price was to be ascertained only in one way, namely, by the decision of two persons, to be nominated in the manner described. If a nomination of that kind fails, or if the two persons named do not make their award, this Court has said there is no *constat* of the price; the contract is not a complete contract, and there is nothing on which it can act.

The Court has adopted this principle (I am not sure that it has not extended it), from the civil law as stated in the Code of *Justinian*, who seems to have taken great pride in having decided a point, which he said was a knotty point, and had occasioned great controversy among lawyers, namely, if a given man is to name the price, whether that is to be considered as equivalent to the *arbitrium boni viri*. The Emperor *Justinian* (1) determined that if *Titius* be unable or unwilling to name the price, the sale is null. But he does not say, that if one of the parties to such an engagement were to throw any obstacle in the way and avail himself of what, in ordinary cases, we should call his own wrong, the Court would still hold the same view, and that a substitution could not be made in order to give effect to the *bona fides* of the contract.

In *Wilks* v *Davis* (2), it was decided that where a man says: "I will not execute the arbitration bond," the Court will hold him free. Whether that is a desirable conclusion or not, it is now too late to question; the Court has so determined, and that, I apprehend, is the law.

I must say that this particular case is one which tries the

(1) Inst. 3, 24, 1; Cod. 4, 38, 15.

(2) 3 Mer. 507.

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principle to the utmost; because it is impossible to avoid seeing the enormous inconvenience which must arise from engagements of this kind, whereby *A.* is at liberty to give a notice which will throw on *B.* the task of purchasing at the end of six months—that period being given to *B.* for preparation—and then *A.* may say, when everything is ready, and *B.* has made his preparations, "all this is to go for nothing, I will not allow my valuer to proceed." It is true that *B.* might take the same course, and at the last moment decline to name a valuer; but in an ordinary case that would be a very strange proceeding, and strange cases should not be permitted to make bad law.

But I must nevertheless adhere to what has been decided. I cannot distinguish this case from *Milnes* v. *Gery* (1), and especially from *Wilks* v. *Davis* (2).

Mr. *James* referred me to that class of authorities, under the *Common Law Procedure Act*, where there has been an actual reference to arbitration, and the parties have declined to name arbitrators. The line may be at times very fine, but I apprehend that in all these cases (as in that of *Collins* v. *Collins* (3), where I agree with the Master of the Rolls, that it could not have been intended by the Legislature that the principle of *Milnes* v. *Gery* should be overruled), if there be a clear right to have some sum or other by way of damages ascertained in some way, and it comes to this, that the valuers have to adjudicate on a point of law, or a point of right between the parties, arising out of the facts, then it ceases to be a simple valuation, and becomes an arbitration.

In this instance there is no difficulty, because the Courts have decided, and we must take it to be positive law, that there is no existing contract until this valuation has taken place; and therefore there is nothing for arbitrators, who may be appointed by the Court, to arbitrate upon. They have no authority: no stranger can be invoked. The only persons who can act are two persons to be named, or two persons to be selected by others; they are to act when the time arrives; if they never come into existence the contract does not exist. That is the principle on which the cases have been decided, and which I am obliged to follow.

(1) 14 Ves. 400. (2) 3 Mer. 507.
(3) 26 Beav. 306.

The bill must be dismissed; but, considering the conduct of the parties, without costs.

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Solicitors for the Plaintiff: Messrs. *Ellis, Parker, & Clarke.*
Solicitor for the Defendant: Mr. *Charles Rivington.*

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Mortgagor and Mortgagee—Foreclosure—Consolidation of Mortgages.

In a suit by a mortgagee for foreclosure, a purchaser of an equity of redemption from the mortgagor will not be permitted to redeem his estate without also redeeming all other mortgages by the same mortgagor which have become united in the Plaintiff, whether such union has taken place before or since the purchase; and whether the purchaser may or may not have had notice of the existence of the other mortgages: and there is no difference in this respect between the position of a purchaser for value and that of a mortgagee of an equity of redemption.

Observations on *White* v. *Hillacre* (1).

Where mortgages of different properties by the same mortgagor have been consolidated by a mortgagee, and the mortgagor has conveyed the equity of redemption in some of the properties to purchasers by deeds of various dates, upon foreclosure by the mortgagee, a first right of redeeming all the mortgages will be given to the first purchaser of part in point of date, with successive rights of redemption, in default, to the subsequent purchasers of other parts in order of date, as in the case of first, second, and third mortgagees.

Secus, where the owners of the equity of redemption, though of different priorities as to the period of their enjoyment, come in under the same instrument; as, for example, tenant for life and remainderman under a settlement.

Observations on *Edwards* v. *Martin* (2).

THIS was a suit for foreclosure, involving questions as to the right of the mortgagee to consolidate his mortgages, or, in other words, to stand on all his securities as one, and say that he will not be redeemed as to any without being redeemed as to all.

By an indenture dated the 26th of March, 1847, a piece of ground and messuage, called *Douro Cottage*, were mortgaged by *Richard Thomas* (who was a builder at *St. John's Wood, Middle-*

(1) 3 Y. & C. Ex. 597. (2) 28 L. J. (Ch.) 49.

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sex), to the Plaintiff, the Rev. *Edward Rigby Beevor*, for a term of years to secure £300 and interest.

On the 1st of July, 1852, *Thomas* mortgaged a house called No. 22, *Wellington Road*, to *John Arthur Buckley* and *Richard Clarke* for a term of years, to secure £800 and interest, and this mortgage was, by an indenture dated the 2nd of April, 1863, and indorsed on the last, transferred by *Buckley* and *Clarke* (*Thomas* being a party) to *Beevor*.

By an indenture dated the 2nd of May, 1853, *Thomas* mortgaged another plot of ground and house, No. 11, *Eaton Terrace*, to *Beevor*, for a term of years, to secure £400 and interest.

On the 12th of July, 1853, *Thomas* mortgaged a piece of ground and house, No. 14, *Eaton Terrace*, to *Buckley*, for a term of years, to secure £400 and interest; and by an indenture, dated the 14th of April, 1855, indorsed on the last, to which *Thomas* was a party, this mortgage was transferred to *Theodore Judkin Dubois*, who, by another indenture dated the 7th of April, 1863, also indorsed on the same, and to which *Thomas* was party, transferred the mortgage to *Beevor*.

On the 22nd of December, 1854, *Thomas* mortgaged another messuage, No. 1, *The Villas*, to *Buckley* and *Clarke*, for a term of years, to secure £600 and interest, and by an indenture, dated the 2nd of April, 1863, and indorsed on the last, to which *Thomas* was a party, this mortgage was also transferred to *Beevor*.

In the year 1855, *Richard Thomas* and his mother, *Elizabeth Thomas*, were in partnership as builders, and by two separate indentures, both dated the 3rd of August, 1855, two adjoining houses, numbered 32 and 34, *Finchley New Road*, were mortgaged by *Elizabeth Thomas* and *Richard Thomas* to *Beevor* and *Campbell Wodehouse* (who was not a trustee for *Beevor*), to secure two separate sums of £1000 and interest; and by two indentures, both dated the 3rd of July, 1863, and indorsed respectively on the two former (*Elizabeth* and *Richard Thomas* being parties), the two mortgages were transferred by *Beevor* and *Wodehouse* to *Beevor* alone.

Prior to the last transfer to *Beevor* of the 3rd of July, namely, on the 11th of May, 1863, by a deed which recited the two above-mentioned mortgages of the 2nd of May, 1853, and the 12th of

July, 1853, and the two transfers of the latter, the equity of redemption in the two houses Nos. 11 and 14, *Eaton Terrace*, was conveyed by *Thomas* to the Defendant, *Alfred Sibson*, subject to the two mortgage debts of £400 and interest. Of this sale *Beevor* first received notice on the 8th of December, 1863. *Sibson*, by his answer, said that, at the time of this purchase he had no notice of any of the other above-mentioned mortgages.

On the 24th of June, 1864, the equity of redemption in the house No. 22, *Wellington Road*, subject to the above-mentioned mortgage of the 1st of July, 1852 (which, as above-mentioned, was, on the 2nd of April, 1863, transferred to *Beevor*), was sold by *Thomas* to the Defendant *William Addis*, subject to the debt of £800 and interest. Of this sale *Beevor* had no notice till the 20th of February, 1865.

On the 11th of July, 1864, the equity of redemption in No. 1, *The Villas*, subject to the above-mentioned mortgage of the 22nd of December, 1854 (which, as above-mentioned, was, on the 2nd of April, 1863, transferred to *Beevor*), was sold by *Thomas* to the Defendant, *William Thomas Standish*, subject to the debt of £600 and interest. Of this sale *Beevor's* solicitor first had notice on the 13th of December, 1864.

Neither *Standish* nor *Addis* had any notice of the other mortgages.

Thomas, the mortgagor, having dissolved partnership with *Elizabeth Thomas*, was, on the 20th of August, 1864, adjudicated a bankrupt, and the Defendants in the first suit, *Michael George Luck*, and *Thomas Ferguson*, were his assignees.

The bill was filed on the 17th of December, 1864, by *Beevor* against *Luck* and *Ferguson*, *Sibson*, *Standish*, and *Elizabeth Thomas*, praying for a declaration that the Defendants were not, nor was either of them, entitled to redeem any of the mortgaged premises until payment were made to the Plaintiff of what should be found due to him on all the mortgages, and that the Defendants might be decreed to pay to the Plaintiff what should be found due to him, or, in default thereof, that the Defendants respectively, and all persons claiming under them, might be foreclosed.

In March, 1865, the bill was amended by making *Addis* a party.

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On the 28th of December, 1865, *Elizabeth Thomas* died, and *Richard Thomas* became her legal personal representative.

On the 27th of March, 1866, *Thomas's* bankruptcy was annulled, and by an indenture of the same date all the estate and interest of *Thomas* became vested in the Defendant in the supplemental suit, *Archibald Scott Lawson*, as trustee for the benefit of *Thomas's* creditors under the *Bankruptcy Act*, 1861.

It was alleged and admitted that the Plaintiff's solicitor formerly acted as the solicitor for *Richard Thomas*, but ceased to act for him prior to April, 1863. On the 9th of April, 1863, *Thomas* applied to his solicitor for the abstract of title to the houses Nos. 11 and 14, *Eaton Terrace*, but did not say for what purpose he wanted them. The solicitor supplied the abstracts, which made no mention of the other mortgages. He had no notice of *Sibson's* purchase till the 8th of December, 1863.

Mr. *G. M. Giffard*, Q.C., and Mr. *Horton Smith*, for the Plaintiff:—

We rely upon *Neve* v. *Pennell* (1); *Vint* v. *Padget* (2); *Tassell* v. *Smith* (3); and *Selby* v. *Pomfret* (4).

The first Defendants, the assignees and trustee of *Thomas*, and *Thomas* himself, did not appear.

Mr. *Amphlett*, Q.C., and Mr. *Brooksbank*, for the Defendant *Sibson*:—

The conveyance to us of the equity of redemption in the two houses, Nos. 11 and 14, *Eaton Terrace*, took place by one and the same deed, on the 11th of May, 1863; and we admit that, as to these, there was such a consolidation that the Plaintiff can insist on our redeeming both, or being foreclosed. But the Plaintiff cannot compel us to redeem any other of his five mortgages. Three of these were his before our purchase; two were assigned to him afterwards.

No case has ever yet gone so far as to decide that, even in the case where the second mortgage has been got in before any severance of the equity of redemption has taken place, consolidation will be permitted against a purchaser of the equity of redemption

(1) 2 H. & M. 170.
(2) 2 De G. & J. 611.
(3) 2 De G. & J. 713.
(4) 3 D. F. & J. 595.

in the first. But where the equity of redemption has become severed before the mortgagee has acquired any interest in the second mortgage, there is clear authority to shew that the purchaser is not bound to redeem both mortgages.

The principle of consolidation of mortgages is, that if you come into equity you must do equity. If you have mortgaged two estates to the same person, you must redeem both, if you seek to redeem either. But that doctrine can only apply to the original mortgagor; it fails when attempted to be applied to a purchaser or a devisee from the original mortgagor. It is said, indeed, that the assignee of the mortgagor must take subject to his equities, and undoubtedly he must as to all equities affecting the estate by contract, but not as to equities which are simply personal to the mortgagor.

A fortiori the doctrine does not apply, where, as in this case, the mortgagee does not become entitled to the mortgage which he claims to have redeemed till after the purchase. This is decided in *White* v. *Hillacre* (1). The present is even a more favourable case than that, for there the decision was in favour of devisees, who may be considered, in one sense, as volunteers; we are purchasers for value without notice.

Neve v. *Pennell* (2) and *Vint* v. *Padget* (3) do not involve the present question. In those cases there was no severance of the equity of redemption; the mortgagor throughout was the same person.

Tassell v. *Smith* (4) is distinguishable in this way: where there is a sub-mortgage the equity of redemption still remains in the mortgagor; it is not severed, it is only pledged; but upon a devise, or a sale out-and-out of the equity of redemption, a severance takes place. If *Seager & Co.*, in *Tassell* v. *Smith*, had been purchasers instead of sub-mortgagees, the case would have been an authority against us.

Selby v. *Pomfret* (5) was the case of mortgagees, who, after the bankruptcy of the mortgagor, got in another mortgage to help out their own insufficient security.

The decision in *White* v. *Hillacre* is relied upon in all the text

(1) 3 Y. & C. Ex. 597, 609.
(2) 2 H. & M. 170.
(3) 2 De G. & J. 611.
(4) Ibid. 713.
(5) 3 D. F. & J. 595.

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books, *Coote*, *Fisher*, and others; it has never been questioned, and it is consistent with *Bovey* v. *Skipwith* (1); *Titley* v. *Davies* (2); and *Willie* v. *Lugg* (3), which overruled three cases there referred to, (two of which are also cited in *Jones* v. *Smith* (4)), namely, *Cator* v. *Charlton*, *Collet* v. *Munden*, and *Ireson* v. *Denn* (5).

Mr. *Kay*, Q.C., and Mr. *L. Mackeson*, for the Defendants, *Standish* and *Addis*:—

The purchaser of an equity of redemption in a property subject but to one mortgage without notice of other mortgages vested in the same mortgagee, is not liable to the equity which the Plaintiff insists upon. The rule at least has been questioned, and the Court will not extend its operation.

[The VICE-CHANCELLOR referred to *Daniels* v. *Davison* (6).]

That was a case of great negligence. The principle depends upon a personal equity, which is gone directly the property gets into the hands of a purchaser without notice: *Titley* v. *Davies*.

Adams v. *Claxton* (7) shews that the right of a mortgagee to tack a subsequent debt to his mortgage cannot be made available against a purchaser for value of the equity of redemption.

Mr. *Giffard*, in reply:—

The result of the authorities is, that to buy an equity of redemption is a very dangerous thing. To be perfectly safe, you must either pay off the mortgagee, or get him to concur in the sale; in other words, get him to contract that he will not consolidate any other mortgages which he may get in. Those who choose to deal with an equity of redemption as these Defendants have done, must take the consequences.

Here, one of the Defendants, *Sibson*, bought before some of our mortgages were acquired, the other Defendants bought after all had been acquired. But it is admitted that if *Sibson* had been a sub-mortgagee instead of a purchaser, the case would have

(1) 1 Cas. C. 201.
(2) 2 Y. & C. Ch. 399, n.
(3) 2 Eden, 78.
(4) 2 Ves. 372.
(5) 2 Cox, 425.
(6) 16 Ves. 249, 254.
(7) 6 Ves. 226.

been covered by authority. Then, what substantial difference is there between a mortgagee and a purchaser? The position of the two is undistinguishable.

The only authority that can be cited in favour of the Defendant *Sibson*, is *White* v. *Hillacre* (1), a case which has never been followed, and is believed to have been referred to in the reports only once, viz., in a note to *King* v. *Smith* (2). Moreover, the devisee in *White* v. *Hillacre* was the son of the mortgagor, and one estate was subject to the mortgage of the father, the other to the mortgage of the son.

The cases first above cited, which are subsequent to *White* v. *Hillacre*, are conclusive.

June 26. SIR W. PAGE WOOD, V.C.:—

In this case, which is a suit for foreclosure on the part of the Plaintiff, in respect of a number of mortgages of different properties vested in him, the question has been raised whether or not a purchaser from the mortgagor, who became such purchaser before the whole of the mortgages were vested in the Plaintiff (there being two outstanding mortgages which were not assigned to the Plaintiff until after the purchaser's title accrued), is bound to redeem those two mortgages as well as the others which are vested in the Plaintiff. It appears that the whole of the mortgages were by the same mortgagor, except that as to two of them he concurred with another person who had a joint interest with himself.

The Plaintiff was an original mortgagee of a portion of the property, and afterwards got in mortgages made by the same mortgagor, including the joint mortgages I have mentioned.

Now the rule as to redemption by the mortgagor is quite clear, being settled by a long series of authorities, as to all the mortgages that were got in by the Plaintiff previous to the filing of the bill. It is needless to go over the whole of the cases which are cited in *Tassell* v. *Smith* (3), and *Vint* v. *Padget* (4), on this subject.

The other question, which was very ably discussed by Mr. *Amphlett*, has been rested upon the decision of Baron *Alderson*, in

(1) 3 Y. & C. Ex. 597.
(2) 2 Hare, 241.
(3) 2 De G. & J. 713.
(4) Ibid. 611.

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White v. *Hillacre* (1). In the present case I need not go through all the mortgages in detail, which are very numerous, but the facts are, that in May, 1863, a particular property (Nos. 11 and 14, *Eaton Terrace*) was sold to Mr. *Sibson*, which was liable to a mortgage by *Richard Thomas*, the mortgagor, at the time it was sold, and that mortgage was then vested in the Plaintiff. The conveyance to *Sibson* being in May, the assignment to the Plaintiff of the two last mortgages (those of 32 and 34, *Finchley New Road*), on which the question has been mainly argued, took place in July, 1863; and *White* v. *Hillacre* is relied upon as shewing that, where there is a mortgage to *A.*, then a mortgage to *B.*, then a sale of the equity of redemption in the latter property to *C.*, and after that sale, and not before, *B.* gets in the mortgage to *A.*, *B.* will not be able to assert against *C.* the right, which would be otherwise vested in him, of calling upon *C.* to redeem both mortgages, or stand foreclosed.

I have been looking carefully through all the cases, and I have deferred my judgment mainly in consequence of that case of *White* v. *Hillacre*, and the case which was so fully gone into by Mr. *Amphlett* of *Titley* v. *Davies* (2). I have carefully read through the case of *Titley* v. *Davies*, but it does not appear to me there is anything in that case which can justify the modification of the doctrine contended for by Mr. *Amphlett*, which is more directly dealt with in *White* v. *Hillacre*. What took place there was in truth only the administration of the ordinary equity, which was established as long ago as in Cases in Chancery, and which has been adhered to ever since. Whether or not the doctrine originally rested on a right foundation, the ground upon which it appears from the authorities to have been put, is this—that where a man has not redeemed his mortgaged property within the limited time, and has forfeited his estate, when he comes into equity to assert a right to have the estate back, the Court has said, "You shall not have equity without doing equity; and if, therefore, having mortgaged a valuable estate as an ample security for an advance made to one mortgagee, you have afterwards mortgaged to the same mortgagee an estate of less value, and the smaller estate will not pay the whole debt, you shall not redeem the estate

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(1) 3 Y. & C. Ex. 597. (2) 2 Y. & C. Ch. 399, n.

which is valuable to you without also paying the debt which is secured on the deficient security." Afterwards that equity was extended (whether rightly or wrongly it is now too late to question), to the case of a person who takes a transfer of the deficient mortgage on the smaller estate. If he gets in the interest of a prior mortgagee from the same mortgagor, he is entitled to stand as against all purchasers subsequent to the second mortgage coming to redeem, and to say: "You cannot redeem one unless you redeem both." *Titley* v. *Davies* (1) was a case of that description. That was all that was decided in that case, and I do not think the *dicta* which occurred there are sufficient to lay so wide a foundation as Mr. *Amphlett* would wish to lay on behalf of his client in the present case.

The case of *White* v. *Hillacre* (2) is no doubt one of some complexity; but the report of the judgment in that case is not given in such a manner as to shew upon what the learned Judge rested his decision. [His Honour stated the facts in *White* v. *Hillacre*, and read the judgment in that case. Upon the passage, in which, Baron *Alderson* says (3), "But this principle manifestly cannot apply to the case where the equity of redemption belongs to different persons," His Honour observed: "Put as broadly as that, we might suppose that the learned Judge was of opinion that, even if the union had taken place, the equity of redemption having been devised to two different sets of persons, the rule would not apply: that could not be so upon the authorities." His Honour read the rest of the judgment, and continued:—]

I must confess that that case is not satisfactory to my mind, even if it were more entirely analogous to the present than it is. There the mortgagor of one property devised the equity of redemption to *A.*, and *A.*, having another estate of his own, mortgaged that estate to *B.*, who afterwards got the two estates united—that is not an authority which can be relied on for the distinction attempted to be made by Mr. *Amphlett*. In truth, as Mr. *Amphlett* fairly admitted, the subsequent authorities have settled that, when there is a third mortgage of the equity of redemption, which takes place anterior to the union of two prior mortgages in the person

(1) 3 Y. & C. Ch. 399, n. (2) 3 Y. & C. Ex. 597.
(3) 3 Y. & C. Ex. 609.

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who attempts to foreclose a third mortgagee, there the equity must prevail. To say that there can be any distinction between a purchaser and a mortgagee for such a purpose as that, I apprehend is quite impossible. In fact, Lord *Hardwicke*, in that very case of *Titley* v. *Davies* (1), says this: "I see no difference between *Peyton* and *Davies*" (*Peyton* being the purchaser); "for though one is a purchaser and the other a mortgagee, that will not differ the case as to *Titley;* for they are both considered as purchasers in this Court *pro tanto*." So that it would be impossible for me to draw a distinction between the case of a purchaser and that of a person coming in as a mortgagee.

The real point seems to be this, as far as it is possible to apply reasoning to a rule which is somewhat difficult to reconcile altogether with sound principles: Whenever the right to redemption is passed over to another person by the original mortgagor, whether he sells the whole property or passes it by way of mortgage only—in either one case or the other, he passes it over subject to the same equities as against the purchaser or mortgagee to which he himself was subject. That being so, the purchaser is obliged to take it, as was said in *Vint* v. *Padget* (2), knowing that it is liable to the contingency of the coalescing of the two mortgaged estates, even although at the time of the conveyance they may not have coalesced. In *Vint* v. *Padget* the person who united the two securities, and then asserted the right, knew before he united them that there was this intervening security. The Court said that the question of notice had nothing to do with it; the Plaintiff has a right to unite the two estates, and, having that right, the person who is unfortunately affected by it must be taken to have known that there was the possibility of such union taking place. Knowing that, he should not have advanced his money on the second mortgage. I think, therefore, I cannot make the distinction which Mr. *Amphlett* attempted.

Mr. *Kay's* case is somewhat weaker than this, and therefore I do not deal with it.

There will be a declaration as prayed by the bill. The estate of Mrs. *Thomas* will have a right to redeem separately the mortgages in which she was joint mortgagor.

(1) 2 Y. & C. Ch. 399, n. (2) 2 De G. & J. 611.

Mr. *Giffard*:—That is a right which will never be exercised, as those securities are insufficient to pay the sums advanced upon them.

July 13. The Plaintiff, the foreclosing mortgagee, having thus established his right to be redeemed, a question arose as to whether the co-owners of the equity of redemption, some of them being purchasers, must all redeem together, or stand foreclosed; or whether, having acquired their interests at different periods, they were to be allowed successive rights of redemption, as in the case of first, second, and third mortgagees: *Seton* on Decrees (1).

Mr. *G. M. Giffard*, Q.C., and Mr. *Horton Smith*, for the Plaintiff:—

This is not the case of first, second, and third mortgagees of the same property. *Sibson* is owner of the equity in part of the property, *Addis* in another part, *Standish* in a third; and the three do not make up the whole. The point was decided by Vice-Chancellor *Kindersley* in *Edwards* v. *Martin* (2).

Mr. *Amphlett*, Q.C., and Mr. *Brooksbank*, for the Defendant *Sibson*:—

We are first purchasers in point of date of part of the equity of redemption, and claim to have first right to be allowed six months to redeem the whole; failing which, the second purchaser in point of date, *Addis*, is to have three months within which to redeem; and so on. The principle was acted upon in *Titley* v. *Davies* (3).

Mr. *Kay*, Q.C., and Mr. *L. Mackeson*, for the Defendants, *Addis* and *Standish*:—

We support the same view, or are willing to have a sale.

Mr. *Giffard*, in reply:—

We cannot assent to a sale.

(1) Page 439; Mortgages No. XVII.
(2) 28 L. J. (Ch.) 49; 4 Jur. (N.S.) 1088; 7 W. R. 31; *Seton*, p. 429.
(3) 2 Y. & C. Ch. 399, n.

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July 22. SIR W. PAGE WOOD, V.C.:—

I have looked into this point, with the kind assistance of Mr. *Leach*, the Registrar, and it is remarkable that no fixed or precise rule on the subject can be found clearly laid down anywhere. Probably that arises from the parties having in most of the cases decided on their own decree.

A general principle, however, may be traced, which is this. Wherever a number of persons, some prior to others as to the period of their enjoyment, come in under the same instrument, as tenants for life and in remainder under a settlement, there no successive rights to redeem are given, but only one single common right of redemption. But where some of the persons interested are prior to others by reason of priority in the date of the instruments under which they claim, as in the case of first, second, and third mortgagees, the person entitled to priority in date has the first right to redeem, and in the event of his not redeeming, successive rights of redemption are given to those who follow.

The question as to purchasers has not been so common; but in this case, where the equity of redemption has been split into three or four portions by different conveyances, the decision in *Titley* v. *Davies* (1) is a clear authority. *Titley*, the purchaser, was there let in before *Davies*, who was a subsequent mortgagee of the same equity of redemption, and successive redemptions were decreed.

The case of *Edwards* v. *Martin* (2) occasioned me some difficulty, because in that instance there were several purchasers of the equity of redemption, and one decree of foreclosure was made against them all, leaving them to come in at Chambers and apply with respect to their rights.

Mr. *Leach* has searched for the decrees in both these cases. That of *Titley* v. *Davies* he finds corresponds with the report. In *Edwards* v. *Martin*, *Titley* v. *Davies* was not cited. Mr. *Leach* says he has no doubt the decree in *Edwards* v. *Martin* was penned by the Vice-Chancellor himself; and it has considerable weight in that respect. But then the Vice-Chancellor had not *Titley* v. *Davies* before him. Mr. *Leach* says he remembers the case, and made a note at the

(1) 2 Y. & C. Ch. 399, n.

(2) 28 L. J. (Ch.) 49; 4 Jur. (N. S.) 1088; 7 W. R. 31; *Seton*, p. 429.

time, that the decree did not fully declare the rights of the parties, but left it to them to work out their rights in Chambers.

I think I ought to follow *Titley* v. *Davies* (1). There will be six months allowed to the first purchaser, and three months to each of the others in succession, in the order in which they acquired their interests in the equity of redemption.

Mr. *Kay* observed that a great additional hardship was imposed on the subsequent purchaser of part of an equity of redemption, in consequence of his having to pay all the first purchaser's costs, including the costs of the suit.

The VICE-CHANCELLOR said that the purchaser had chosen to run this risk. It was a very dangerous thing at any time to buy equities of redemption, or to deal with them at all.

Solicitor for the Plaintiff: Mr. *G. E. Philbrick.*

Solicitors for the Defendants: Messrs. *Brooksbank & Galland;* Mr. *G. J. Parson.*

PIGOTT *v.* PIGOTT.

Husband and Wife—Land Tax—Marriage of Female Proprietor—Registration of Marriage by Husband—Mortgage by Husband—Reservation of Equity of Redemption to Husband—Right of surviving Wife to redeem—38 *Geo.* 3, *c.* 60, *s.* 78.

Land tax having been redeemed, was bequeathed by will to a married woman. Afterwards, the husband, having registered his marriage in the Land Tax Office in the manner required by the 78th section of the 38 Geo. 3, c. 60, mortgaged the land tax in the form of assignment which is prescribed by the Act; he (by a deed of even date) covenanting to pay the mortgage debt, and reserving the equity of redemption to himself alone. The wife survived:—

Held, that the husband of a proprietor of land tax, upon registering the marriage under the Act, acquires an absolute power of disposition over it:

Held, further, that as the husband in this instance had disposed of the land tax only to the extent of the mortgage debt, the right of the surviving wife to the property, subject to payment of the debt, was not alienated.

THIS was a Petition in a suit for the administration of the estate of the testator, the late *John Hugh Smyth Pigott*, for the purpose

(1) 2 Y. & C. Ch. 399, n.

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of recouping to the estate of his widow (since deceased) moneys which had been (as alleged) erroneously received and applied as part of the estate of her husband, the testator.

By a deed-poll dated the 17th of May, 1799, two of the Land Tax Commissioners, under the 38 Geo. 3, c. 60, certified that they had contracted with *John Pigott* for the redemption by him of land tax amounting to £184 2*s.* 9¼*d.* charged upon lands in *Somersetshire;* that *John Pigott* had declared his option to be considered on the same footing as a person not interested in the hereditaments, and that the consideration of the redemption had been declared to be £6751 14*s.* 11¼*d.*, £3 per Cent. Bank Annuities, to be transferred to the Commissioners for the Reduction of the National Debt. This transfer was made.

John Pigott died intestate on the 28th of July, 1816. His administrator and sole next of kin, *Wadham Pigott,* died on the 25th of December, 1823, having devised his undisposed of residue to *Ann,* wife of *John Hugh Smyth,* and appointed her his sole executrix.

By a deed-poll, dated the 29th of November, 1847, under the hand and seal of *John Hugh Smyth* (afterwards *J. H. Smyth Pigott,* the testator), made in the form prescribed by the *Land Tax Act,* and registered in the Land Tax Redemption Office, the testator professed to assign the land tax of £184 2*s.* 9¼*d.* to *Francis Fownes Luttrell,* as a part security for the repayment of a sum of £3,000, and interest. By an indenture of even date reciting the last-mentioned deed-poll, the testator assigned other property to the said *F. F. Luttrell,* in part security for the repayment of the same mortgage debt, and in this indenture was contained a proviso for redemption, both of the land tax and of the property comprised in the indenture, to the testator alone; and he alone covenanted to repay the debt and interest.

In 1852, *F. F. Luttrell* was paid off, and by a deed-poll, dated the 20th of January in that year, also in the form prescribed by the *Land Tax Act,* and duly registered, *F. F. Luttrell* professed to assign the land tax to *William Edward Fox* and three other persons. By an indenture of even date, after reciting the last-mentioned deed-poll, and in consideration of a further advance of £100, the testator professed to assign the same land tax to the said *W. E. Fox* and the three others to secure £3100 and interest,

subject to a proviso for redemption to the testator alone; and he alone, as before, covenanted to pay the debt and interest.

Out of the land tax *W. E. Fox* and his co-trustees retained the interest on the £3100, and part paid the interest on another mortgage debt; and the Petitioners, who represented Mrs. *Pigott's* estate, claiming in respect of the mortgage of the land tax £2577 18*s.* 6*d.*, prayed for a declaration that the land tax formed no portion of the testator's assets, and had been erroneously treated and dealt with as such, and that the same formed part of the personal estate of the testator's widow, which was not reduced into possession by him against her and her representatives, and for consequential relief.

The questions were, whether land tax redeemed is property which, by virtue of marriage, vests absolutely in a husband; and if not, whether a husband acquires by marriage a right during the coverture of dealing with it absolutely, as if it were a *chose en action* of the wife; and further, if so, whether the testator did effectually dispose of it absolutely by registering his marriage, and then mortgaging the land tax, and reserving the equity of redemption to himself alone.

Mr. *G. M. Giffard*, Q.C., and Mr. *Fooks*, for the Petitioners:—

Land tax, when redeemed, is a perpetual annuity in the nature of personal estate; and we say that the husband of a proprietor of land tax is entitled to nothing more than the payments accruing *de anno in annum* during the coverture.

The statute of the 38 Geo 3, c. 60 (June 21, 1798), makes land tax (sect. 1) a perpetual annuity, subject to the conditions of redemption or purchase therein mentioned. The 99th section (1) declares that land tax when redeemed is to be personal estate; and the 78th section (2) gives to proprietors of land tax power to "sell,

(1) By the 99th section of the 38 Geo. 3, c. 60, it is enacted "That all land tax which shall be redeemed or purchased in pursuance of this Act, except where the same shall be discharged by virtue of this Act, or in cases where other provisions are made by this Act, shall be deemed personal estate, and transmissible as such, and not of the nature of real estate."

(2) The 78th section of the 38 Geo. 3, c. 60, enacts as follows:—

"That it shall be lawful for the proprietors for the time being of any land tax which shall have been purchased n pursuance of this Act, to sell, dis-

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dispose of, and transfer" the same, and prescribes the formalities which are necessary for a proper assignment. What is required is an assignment in writing in a specified form, with a certificate of

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pose of, and transfer the same in the manner, and subject to the rules and conditions hereinafter mentioned, and that the assignment thereof shall be in writing in the form specified in the schedule hereunto annexed, marked (D); and on every such assignment, and also in every case where any assignment shall be made of any land tax in pursuance of any claim or demand by virtue of this Act, the assignment of such land tax shall be produced to the proper officer to be appointed for that purpose, who shall enter a memorial of such assignment in a book or books to be provided and kept for that purpose, and shall certify the entry of such memorial by an indorsement on such assignment; and where any person or persons shall, in right or by virtue of his or their marriage, become entitled to any land tax which shall have been redeemed or purchased in pursuance of this Act, an affidavit, containing a copy of the register of such marriage, shall be made and sworn to, or affirmed by some credible person, before a judge, &c., and shall be transmitted to such officer as aforesaid, who shall make an entry thereof in the book or books which shall be kept for entering memorials of assignments of such land tax, and such officer shall, upon the application of the person or persons entitled to such land tax, grant to him, her, or them, a certificate of such entry; and where any person or persons shall, as executor or executors, administrator or administrators, of any person deceased, become entitled to any such land tax, the probate of the will or testamentary instrument, or letters of administration, under which such person or persons shall be so entitled, shall be produced and shewn to such officer, who shall enter the same, and grant a certificate thereof in manner aforesaid; and such officer is hereby required to make out a duplicate of every such certificate, fairly written under his hand, and to deliver, or cause to be delivered, such duplicate to the Receiver General in *England*, or collector in *Scotland*, for the county, riding, stewartry, or place, wherein such land tax shall be charged; and after the delivery of such duplicate to such Receiver General, or his deputy or deputies, or to such collector, the person or persons to whom any such land tax shall have been transferred or transmitted as aforesaid shall, upon the production of such certificate to such Receiver General, or his deputy or deputies, or such collector, be entitled to demand, have, and receive, for his, her, or their own use, the full amount of the land tax which shall be specified and mentioned in such certificate, free of all charges and deductions whatever, and in the same manner in all respects as if he, she, or they, had been the original purchaser or purchasers of such land tax; and the receipt or receipts of such person or persons shall be a sufficient discharge to such Receiver General, or his deputy or deputies, and collector, for the same."

The schedule contains the following form:—

"(D.)

"FORM OF ASSIGNMENT.

"I, *A. B.*, of , in consideration of , paid to me by *C. D.*, of ,

the entry of a memorial of such assignment indorsed on the deed. In the case of a person becoming entitled by virtue of marriage, a certificate must be procured of the entry of an affidavit containing a copy of the register of the marriage. In the case of a person becoming entitled as executor or administrator, a certificate must be procured of the entry of the probate of the will, or of the letters of administration, as having been produced and shewn to the proper officer. These certificates are to be prepared in duplicate, and delivered to the Receiver General, and after such delivery the person to whom the land tax shall have been transferred or transmitted is entitled, upon producing his duplicate of the certificate, to receive the amount.

In this instance, we contend, nothing less than an assignment in the specified form by the husband and wife to the husband alone was sufficient in order to vest the property in the husband absolutely.

If this had been stock in the Three per Cents., nothing but a transfer into the husband's name would have been enough. A transfer into the name of a third person as mortgagee would not have sufficed.

There is nothing in the statute to say that the husband of a proprietor of land tax is to become absolutely entitled by force of the marriage; the statute does not define the rights of a husband; all it says is, that the receipts of the husband during coverture shall be good discharges. His assignment can have no more effect, as far as his rights are concerned, than the registration of his marriage. Entry of probate, or of letters of administration, would not entitle the executor or administrator as against the devisees or next of kin. All that the Act says is, that the pro-

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do hereby bargain, sell, assign, and transfer to the said *C. D.*, his executors, administrators, and assigns, the yearly sum of , being the whole [*or* part] of the land tax charged upon certain manors, messuages, &c., [*here describe the nature of the estate*] in the parish of , in the county of , [*or*, being part of the land tax charged upon the parish of] to hold to the said *C. D.*, his executors, administrators, and assigns, with the same benefits and advantages, and subject to the same right and power of redemption, restriction, and conditions, as I held the same immediately before the execution hereof.

"Witness our hands and seals, the day of , in the year of our Lord ."

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prietor may assign; here there has been no assignment by Mrs. *Pigott*, the proprietor.

Mr. *Everitt*, for Respondents opposed in interest to the Petitioners:—

This property being in the nature of a chattel, the husband became absolutely entitled to it *jure mariti*. If not, by complying with the provisions of the Act he acquired an absolute right of dealing with it.

Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, for Respondents on the same side:—

If, by complying with the statute, a husband cannot absolutely dispose of land tax, then we have the anomalous circumstance of personal property belonging to a wife, though not settled to her separate use.

The descriptions of property to which land tax is most analogous are stock in the funds and shares in public companies.

The *Stock Act* of the 41 Geo. 3, c. 3 (March 12, 1801), provides (sect. 5) that "the several subscribers or contributors, their executors, administrators, successors, and assigns, shall be entitled to an annuity after the rate of £3 for every £100 by him, her, or them, respectively advanced and paid;" and enacts (sect. 6) that as soon as "any contributors, their executors, administrators, successors, or assigns, shall have completed their payments," the persons to whose credit the principal sums shall be placed in the bank books, "their respective executors, administrators, successors, and assigns, shall and may have power to assign and transfer the same, or any part, share, or proportion thereof, to any other person or persons;" and further (sect. 17), that "all persons who shall be entitled to any of the annuities hereby granted, and all persons lawfully claiming under them, shall be possessed thereof, as of a personal estate which shall not be descendible to heirs."

The 7th section of the *Companies Clauses Act* (8 & 9 Vict. c. 16) contains a declaration as to shares being personal property, similar to that contained in the *Land Tax Act*. The 18th section of the same Act provides that the transmission of shares by other means than transfer is to be authenticated by a declaration; and the 61st section gives power to consolidate shares into stock.

The similarity of these provisions shews that there is no substantial difference between land tax and stock in the public funds and in companies.

As to shares and stock in public companies standing in the wife's name, that they by marriage become the absolute property of the husband is clearly laid down in *Warden* v. *Jones* (1).

As to sums of stock in the funds standing in the name of the wife, no doubt if the husband does not exercise any act of dominion during the coverture, they will go to the surviving wife: *Scawen* v. *Blunt* (2); *Wildman* v. *Wildman* (3); and even a transfer into the husband's name, if only as co-trustee, will not destroy the wife's right by survivorship: *Wall* v. *Tomlinson* (4). But it has never been held that a mortgage by the husband, reserving the equity of redemption to himself, is not a sufficient reduction into possession.

It is a mistake to call an annuity a mere *chose en action;* for it is assignable at law. In this instance the annuity is payable out of revenue, and, therefore, undoubtedly personal property, and assignable and devisable as such: *Aubin* v. *Daly* (5), and the authorities there cited.

Mr. *Giffard* in reply:—

This cannot be a personal annuity, because it is not granted by any person. If *A.* grants an annuity to *B.*, *B.* may have a writ of annuity against *A.* No writ of annuity could possibly issue in this case. This is a perpetual annuity charged upon or granted out of real estate.

There is no analogy between land tax and bank annuities. Before powers were given by statute of assigning and devising bank annuities, a share of public funded stock was a *chose en action* in the strict sense of the word. Three per cent. stock was and is in the nature of interest on a debt, which the Government may at any time redeem (41 Geo. 3, c. 3, ss. 22, 23). Then the Legislature stepped in and said that these capital sums, or any part of them, might be transferred and assigned in the bank books; and then that they might be charged by a judgment creditor.

(1) 2 De G. & J. 76, 87. (3) 9 Ves. 174.
(2) 7 Ves. 294. (4) 16 Ibid. 413.
(5) 4 B. & A. 59.

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When, therefore, you transfer stock in the funds, you transfer —not an annuity, but a capital sum: *Keyser* on the Law of the *Stock Exchange* (1).

Nor is there any analogy between land tax and shares or stock in a company, because shares and stock are aliquot parts of a trading concern. Sect. 18 of the *Companies Clauses Act* provides, that "if the interest in any share have become transmitted in consequence of the marriage of a female shareholder," such transmission is to be authenticated by a declaration, which is to be left with the secretary, who is then to enter the name "of the person entitled under such transmission" in the register. It does not necessarily follow that the registration of the husband as the person entitled under a transmission, in consequence of the marriage of the female shareholder, is such a reduction into possession as will exclude the right of the surviving wife. During the coverture actions for calls must be brought against husband and wife; and after his death the action must be brought against her.

We say, then, this land tax must be treated as personal estate, and is subject to the condition that the husband, by his assignment alone, cannot so reduce it into possession as to exclude the right of the surviving wife.

Sections 32 and 40, of the 38 Geo. 3, c. 60, provide that in cases where surplus stock, or trust money applicable to the purchase of real estate, has been laid out in the purchase of land tax, such land tax is to be deemed to be of the nature of real estate. Suppose land tax had been bought under the above circumstances, and assigned to the wife by a deed in the form (D), is it to be argued that a husband by simply mortgaging, as in this case, could destroy his wife's interest without a fine by her? The 78th section merely directs the public officer to pay to somebody, and then a special power of alienation is given. What is this but a mere ordinary *chose en action?* Unless you find some special enactment giving to the husband a greater power than is given by the ordinary rule of equity, how are you to imply it? The whole scheme of registration is, not to give a husband a right as against the wife, nor to alter the rights of the parties, but solely to enable the husband to deal with his own limited interest in the property.

(1) Pages 49, *et seq.*

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But, even supposing he could, did Mr. *Pigott* do enough, in this instance, to reduce the property into his possession? A mortgage by a husband of his wife's leaseholds, though the equity of redemption be reserved to him, will not defeat her right as survivor: *Clark* v. *Burgh* (1); *Bright's* Husband and Wife (2). Nor will the mere deposit by him of title deeds of his wife's property, destroy the right of the surviving wife to redeem: *Bates* v. *Dandy* (3).

There being no power given by this statute to assign the wife's estate, we say, first, that she has a right to the whole; but, if the mortgage be held a binding charge, we then say the husband's assignment must be treated as a mortgage, and nothing more.

The VICE-CHANCELLOR:—I have not the slightest doubt as to the power of the husband to assign, and to make a marketable title to this land tax; but, as to the second point, whether a simple registration of marriage by the husband disposes of the wife's right by survivorship, and whether this must not be treated as a mere mortgage of the interest by the husband, subject to the wife's right to redeem, I must consider.

July 19. SIR W. PAGE WOOD, V.C.:—

This is a very interesting case.

The question that arises is, as to what is the position, as between husband and wife, of their two estates, with regard to certain land tax, which was the property of the wife, as to which the husband had registered himself, if I may so express it, as husband, in the form prescribed by the Act; and of which he then registered a mortgage for £3100, by a deed in which he alone covenanted to pay the purchase-money, and in which the equity of redemption was reserved to himself alone.

Upon that two questions have arisen:—On the one hand, the applicants, the executors of the wife, claim, on her behalf, to have the benefit of the whole of this land tax, and to charge the husband's estate with payment of the mortgage debt. It has been said on their behalf that the husband could not assign, beyond his

(1) 2 Coll. 221. (2) Vol. i. p. 107. (3) 2 Atk. 207; 1 Russ. 33, n. 2

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life interest, and for accruing payments, the reversionary *chose en action* of a married woman, according to the doctrine of *Stiffe* v. *Everitt* (1). Now, I should certainly have thought it strange if the rule had been so, regard being had to property of a similar character, such as shares in public companies, and sums in the public stocks and funds, as to which the income is derivable by the wife *de anno in annum*, and which is, in that sense, so far reversionary, although nobody ever seems to have thought of treating it in that way. On the first branch of the argument, I thought it plain that the husband has power, if he be so minded, to part with the whole interest in the property.

But the second point raised by Mr. *Giffard*, on which, I think, his contention was correct, was, that notwithstanding the proviso for redemption by the husband, the Court will look at the dealing of the husband with this property as being simply for the purpose of a mortgage; and that, so far as he has not disposed of the interest, it remains with the wife, but without giving her a right of having the mortgage paid off. In the case of *Clark* v. *Burgh* (2), the leasehold estates of the wife were treated in the same fashion. Although the equity of redemption was reserved to the husband, Vice-Chancellor *Knight Bruce* followed the doctrine settled by several cases with regard to a mortgage of the wife's real estate, with this difference, that he held the wife to have no right to call upon the husband's estate to redeem the charge. He held that the husband had a right to dispose of the interest, but he followed the doctrine of those cases which say, that the mere circumstance of the reservation of the equity of redemption to the husband will not do more than operate as an indication of an intention to redeem the mortgage.

Now, the intention of the framers of the statute of the 38 Geo. 3, c. 60, seems to have been, that persons purchasing under the Act, and stating their intention that the land tax shall not be merged, are entitled to have the sum which they have paid for purchase or redemption invested in consols, and to have the dividends, or a sum equal to the dividends, of those consols paid over to them from time to time. It is directed, by the 77th section of the statute, that the Receiver General shall, after the land tax shall have

(1) 1 My. & Cr. 37. (2) 2 Coll. 221.

been redeemed or purchased, upon demand, and upon production of the contract when required, "pay, or cause to be paid, to the purchaser or purchasers thereof, or the executors, administrators, or assigns, of such purchaser or purchasers respectively, the full amount of the land tax so purchased," out of any money in his hands arising from the produce of the land tax; and if he shall not have sufficient money in his hands arising out of the land tax, then out of any other moneys in his hands. Then the 78th, which is the important section, provides, that "it shall be lawful for the proprietors for the time being of any land tax," to "sell, dispose of, and transfer" the same. So that any person owning land-tax has a power of complete and absolute disposition over it. It appears to me, therefore, that it is not like a thing accruing *de anno in annum;* it is more like an annuity, which is a thing that will pass by grant at common law. By the operation of the statute, it passes at once from the person called the proprietor to the person who shall be the assignee; it passes bodily, out-and-out, by the assignment, like a share in a railway company, or a share in the public stocks or funds:—[His Honour read the main provisions of the 78th section; observing that it includes persons who, "in right or by virtue of marriage," may "become entitled," and continued:—]

What I apprehend is, that marriage places the husband in the position of any other proprietor. But the suggestion, however ingenious, never seems to have occurred to anybody before, that the interest is, in truth, reversionary in the wife. In this instance the husband, having obtained the certificate of his title in right or by virtue of his marriage, executes a mortgage. This is the form in which the mortgage is entered. It stands on the register thus:—"Number of the registry of contract, 42,997. Name of the party heretofore entitled to the land tax, *Ann Smyth Pigott.* Name of the party now entitled to the land tax, *Francis Fownes Luttrell,* Esq." So that the form it takes in the books is this: they do not alter the name of the proprietor of the land tax; but the husband has, by the statute, the power of assigning it. It is something like the entry in the bank books of a sum of stock in the names of husband and wife.

The wife is named as the proprietor of the land tax; the

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husband has the certificate, which enables him to deal with it. He does deal with it, and makes an out-and-out mortgage, which I think he has clearly the right to do. I must consider it as if it were a dealing with the shares of a public company, which the husband takes by virtue of his wife's right. Selling that right, he sells all the interest he has in the fund, to the extent to which he disposes of it.

But this fund being disposed of only to the extent of £3100, there comes this further question, whether it is not like the case of stock standing in the names of husband and wife, of which, if the husband dies without having disposed of it, the wife remains the proprietor. As regards the dealing with it by way of mortgage, I do not know that any such case has arisen, or what would be the result of such a dealing; but in this case this lady remains on the list as "former proprietor" up to the date of the mortgage to *Luttrell*. Then we find a mortgage to *Luttrell*, reserving the equity of redemption solely to the husband. He has reduced into possession all that he has disposed of, namely £3100; but the question is, whether he has reduced into possession the remainder of the wife's right which he has not disposed of.

The right of disposition of the husband, as subject to the wife's right as legal owner, is analogous to the case of a promissory note or bill of exchange. In Sir *E. Vaughan Williams's* valuable book (1), there is a full discussion of all these cases. It seems to have been at first thought that, upon marriage, a bill of exchange of the wife became the absolute property of the husband, simply by the fact of marriage. There is a *dictum* in *Connor* v. *Martin* (2), that her right is entirely gone. But later authorities have decided that the wife's right remains, if the husband does not reduce it into possession in his lifetime. She has an interest, which the husband has a right to dispose of, but, as far as he has not done so, it remains hers. Of course the legal title of the wife is gone, and he alone can sue during the coverture. It is very similar to the case of the wife's leaseholds, where the legal estate has been assigned, but where the Court has nevertheless said that the intention was only to execute a mortgage.

(1) Wms. Ex. 6th Ed. pp. 794—798.
(2) Cited 3 Wils. 5; S. C. 1 Str. 516.

The equitable doctrine of stoppage *in transitu*, again, is very like this. The whole legal title passes by the indorsement over of the bill of lading, but if it be only done for the sake of making a mortgage, the Court regards the mortgage as the only purport of the assignment, and that the effect of the assignment is stayed as soon as the mortgage is answered. This application of the doctrine in the case of stoppage *in transitu* is certainly a strong one, because the property has actually passed to the mortgagee; but the Court, in *Spalding* v. *Ruding* (1), nevertheless held that it remained in the mortgagor.

So here, the husband having assigned this property only to the extent of £3100, it is the same thing as if he had assigned only a part of the land tax. The circumstance of his having reserved the equity of redemption to himself does not appear to me to affect the question.

Mr. *Giffard*:—Does not your Honour think we are entitled to the benefit of the husband's covenant?

The VICE-CHANCELLOR:—No; it was not so held in *Clark* v. *Burgh* (2).

MINUTES.—Declare, that it appearing that part of the sum of £2393 16*s.* received in respect of the land tax had been applied in keeping down the interest on the mortgage sum of £3100, and that £675 13*s.* 7*d.*, further part thereof, had been applied to a purpose in respect of which the testator's real estate only was chargeable, and that the testator's estate had thus been benefited to the amount of £675 13*s.* 7*d.*; declare that that sum ought to be recouped to the estate of the widow out of the testator's estate.

Solicitors for the Petitioners: Messrs. *Mead & Daubeny.*
Solicitor for the Respondents: Mr. *T. Baker, Jun.*

(1) 6 Beav. 376. (2) 2 Coll. 221.

V.-C. W.

1867

May 31; *June* 5.

PENFOLD *v.* MOULD.

Husband and Wife—Fund standing to Wife's separate Account—Consent of Wife to Transfer of Fund to her Husband—Revocation of Consent before Transfer.

The consent of a married woman had been given before Commissioners, for the transfer and payment to her husband of sums of stock and cash standing in Court to her separate account:—

Held, that this did not amount to a declaration of trust, and that it was competent to her, at any time before the transfer had been completed, to retract her consent.

PURSUANT to an order dated the 20th of July, 1861, two sums of stock and a sum of cash were transferred to the credit of a cause of *Mould* v. *Cox*, "The separate account of *Jessy Mary Anne*, wife of *William Penfold*."

On the 7th of January, 1864, whilst Mrs. *Penfold* was living with her husband in *Burmah*, an application was made to His Honour, in Chambers, by summons, for an order that the sums of stock and cash might be paid to *William Penfold*, or his attorneys, and that certain Commissioners might be appointed to examine Mrs. *Penfold*, apart from her husband, as to the disposition of these sums.

In compliance with an order, dated the 26th of January, 1864, Mrs. *Penfold*, on the 13th of January, 1865, was examined by the Commissioners, and then expressed her wish that the stock and cash should be transferred and paid to her husband's attorneys. This was certified to the Court by the Commissioners, who also certified that Mr. and Mrs. *Penfold* had jointly and severally made an affidavit of no settlement.

On the 13th of March, 1865, another summons was taken out by Mr. and Mrs. *Penfold*, for transfer and payment to *William Penfold's* attorneys on his behalf, but no order was then made, in consequence of there being no proper power of attorney authorizing the attorneys to receive the same.

On the 9th of June, 1865, *William Penfold* died in *Burmah*. After his death, but before the fact was known in *England*, the summons was again brought on in Chambers, and by an order

made thereon on the 8th of July, 1865 (but dated the 22nd of July, 1865), it was ordered that the two sums of stock and sum of cash should be transferred and paid to *William Penfold*, and the stock was so transferred in the Bank books.

Administration had been since taken out by *John Mould* to the estate of *William Penfold*, and he had obtained an order in Chambers for the payment to him of the sum of cash. The stock was still standing in *William Penfold's* name.

This bill was filed on the 20th of March, 1867, by Mrs. *Penfold*, the widow, against *Mould*, and certain creditors of her late husband, praying for a declaration that (subject to the payment of certain holders of a bill of exchange, which had been drawn by her late husband, and signed by him and her, charging this property), she was entitled to the sums of stock, and the dividends thereof, and to the sum of cash.

To this bill *Mould*, the administrator, demurred.

Mr. *Hemming*, for the demurrer:—

The only question is, whether this lady has done enough to make a complete declaration of trust, or whether it was a mere voluntary incomplete gift, which the Court will not enforce. Nothing turns upon the circumstance of her being a married woman, the property being separate property, and the commission unnecessary.

It is submitted, however, that it is incompetent to Mrs. *Penfold*, having declared in the most solemn way before Commissioners her intention of leaving this fund to her husband, now to revoke that declaration, and dispose of the fund in another manner. *Ex parte Pye* (1), and *Richardson* v. *Richardson* (2), shew that a declaration of trust may be established by any act indicating an intention that the beneficial interest should pass.

Mr. *Lindley*, for the bill:—

In order to make a complete gift, there must be an intention to give, and a delivery up of the thing intended to be given. The two things must coincide. The transfer which has taken place into the husband's name is absolutely void, he being dead at the time.

(1) 18 Ves. 140. (2) Law Rep. 3 Eq. 686.

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Then, supposing the fund to be now standing to her separate account, could she not, as against the assignees in bankruptcy, or, as here, against the personal representative of the husband, be permitted to say that the altered circumstances of the case had rendered the fulfilment of her intention impossible? She was desirous to give the fund to her husband, but is not willing that it should go to his creditors.

In almost all the cases, the incompleteness in the fulfilment of the intention to give has arisen from the death of the donor. There is no known instance of its having arisen, as here, from the death of the donee.

Mr. *Hemming*, in reply.

June 5. SIR W. PAGE WOOD, V.C., after stating the question, continued:—

The case, as has been very properly admitted by Mr. *Hemming*, must be taken as if it had occurred at the time when the order of July, 1865, was applied for. I must regard it as if the revocation had been made by this lady before any transfer into the name of her deceased husband had taken place.

That being so, I think that the case stands upon the same ground as those of which so many have occurred of late, where the question has been one of voluntary assignment. The principles upon which these cases rest may appear somewhat arbitrary, but their application is quite simple. *Primâ facie* wherever there is an out-and-out assignment of the property, as far as the grantor can pass it, as in *Kekewich* v. *Manning* (1), or an undoubted intention to pass the property, although other acts, such as notice to the trustees and the like, may be wanting, the Court will not hesitate to declare that the grantor has constituted himself a trustee.

This conclusion is said to be opposed to *Meek* v. *Kettlewell* (2); but *Meek* v. *Kettlewell* was founded on the logical consequences of the rule, that a voluntary assignment of an equitable *chose in action* is a voluntary agreement to pass something *in futuro*, and that the

(1) 1 D. M. & G. 176. (2) 1 Hare, 464.

Court will not decree performance of an agreement to assign. *Meek* v. *Kettlewell* (1) decided that a mere intention to pass an estate cannot be carried out, unless it be accompanied by an express declaration of trust.

That decision has been in effect overruled, and it is now held that any instrument may be a sufficient declaration of trust; no form being necessary: the only material question being, "Did the grantor, or did he not, mean at once to pass the property?"

Ex parte Pye (2) is a leading authority in this class of cases. In that case the donor had written a letter directing the purchase of an annuity to be made in the name of *A*. The purchase was in fact made in the name of the donor, who thereupon sent a power of attorney authorizing a transfer to *A*. The donor died before the power was acted on, and the Court held that there had been an effectual declaration of trust.

On the question how far the consent of a married woman is revocable, after looking into the authorities I have found very little on the subject. It has happened to myself to have to ask a married woman to reconsider her decision, although she has given her consent. On the other hand, I have known instances where a lady has changed her mind before the actual transfer has been made. The only observations I have been able to find bearing upon this point are those of Lord *Alvanley*, in *Wright* v. *Rutter* (3). He says: "Property circumstanced as this is, is just like real property at law; she is a person whose consent cannot be given but under examination apart from her husband, and with full knowledge of her right; therefore, when I was a Judge at law, I always did, and I suppose the Judges of the Court of Common Pleas do, explain to the wife the consequence. If with full knowledge of that she does freely and voluntarily consent, the Court will permit the property to be acted upon, but not otherwise; I have known cases where even then the Court has not done it: but we do it in general; and I rather think, if she persists, we cannot refuse."

I think I must follow this authority. The Court has a power of postponing the question of transfer, though the married woman

(1) 1 Hare, 464.

(2) 18 Ves. 140.

(3) 2 Ves. 673, 677.

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may have given her consent. So long as the transfer remains incomplete, the wife can at any time revoke her consent. Suppose, for example, she were to come and tell the Court that in the meantime her husband had gone off with another woman, that might be a reasonable excuse. Here she comes and says that her husband has died. I shall not, therefore, make the final order. The whole question turns upon the rule laid down in those observations which I have read from Lord *Alvanley's* judgment.

The demurrer must be overruled.

Solicitors for both parties: Messrs. *Hughes & Muskett.*

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In re RICHMOND HILL HOTEL COMPANY. *Ex parte* KING.

Bankruptcy Act, 1861, *s.* 192—*Reasonable Provisions—Omission of Debt from Schedule.*

A deed under the *Bankruptcy Act*, 1861, s. 192, is not to be deemed unreasonable on the ground that it postpones the payment of the debts for two years, although it gives no benefit to the creditors except the covenant of the debtor.

Semble, a deed which is assented to by the required majority of creditors cannot be unreasonable, unless it gives them some advantage over the minority.

The omission of a debt from the schedule is not a ground on which the Court of Chancery can hold a deed to be invalid, if the requirements of the 192nd section of the *Bankruptcy Act*, 1861, are satisfied.

The question of compliance with the General Order of the 22nd of May, 1862, is not one to be considered by a Court of Equity.

THIS was an application, adjourned from Chambers, that all proceedings to enforce the payment of past or future calls in the winding up of the *Richmond Hill Hotel Company, Limited*, might be suspended as against *John Thomas King.*

Mr. *King* was the holder of thirty shares in the company, and he owed the company £90 for calls made in 1864 and 1865. On the 11th of October, 1866, the calls being still unpaid, he executed a deed for the benefit of his creditors. The deed was made between himself of the one part, and all his creditors of the other part;

and, after a recital that it would be prejudicial to the interest of his creditors, and ruinous to himself, to sell certain shares then belonging to him, the creditors covenanted not to sue for two years from the date of the deed, and Mr. *King* covenanted to pay the debts, with interest at 5 per cent. per annum from the date of the deed, at the expiration of the two years; and further, to pay, within three calendar months, the costs of such of them as had then commenced proceedings against him. It was also provided that, in default of payment, the deed should cease to be binding on the creditors, and the remedies of the creditors against sureties were reserved.

The deed was registered under the *Bankruptcy Act*, 1861. The debts in the schedule amounted to nearly £24,000, and the assenting creditors (who were a majority in number) represented more than £21,000. The £90, however, owing to the company was not included in the schedule.

On the 21st of November, 1866, an order was made for the winding up of the company, and, on the 11th of May, 1867, a four-day order was made for the payment of the unpaid calls. On the 13th of June another call was made of £3 per share, payable on the 4th of July. On that day the present summons was taken out, and it was adjourned into Court on the questions arising as to the validity of the deed.

Mr. *North*, in support of the summons:—

The 198th section of the *Bankruptcy Act*, 1861, protects the applicant from any process in respect of the debt without the leave of the Court, which has been decided, in *Skelton* v. *Symonds* (1), to mean the Court of Bankruptcy; but it does not protect him against proceedings for contempt, in not paying the calls under the order of the Court; therefore we must come here for protection.

The deed is alleged to be no defence to such proceedings: first, because the debt to the company is omitted from the schedule. But all the provisions of sect. 192 of the *Bankruptcy Act*, 1861, have been complied with. The deposit of the account of debts is

(1) 34 L. J. (C. P.) 151. 11 Jur. N.S. 140

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required, not by the Act, but by the General Order of the 22nd of May, 1862 (1); and the deed, therefore, is valid until it is upset by the Court of Bankruptcy. If the debt were inserted, it could not affect the required proportion of assenting creditors, and at this distance of time the Court would not, in any case, annul the registration: *Ex parte Savin* (2). In that case, moreover, Lord Justice *Turner* suggested a doubt whether the General Order was not invalid, as imposing conditions which alter the effect of sect. 192.

As to calls made since the execution of the deed, the estimated value of the liability to them ought to be proved as a debt under the deed: *Companies Act*, 1862, s. 75; *Wood* v. *De Mattos* (3). The debtor's liability was incurred when he became a shareholder: *Williams* v. *Harding* (4); therefore no claim can now be made personally against him.

Secondly, the deed is said to be unreasonable; but similar deeds have been held to be reasonable in *Gresty* v. *Gibson* (5); *Reeves* v. *Watts* (6); and the objection that the time of payment is too extended is met by the case of *Stone* v. *Jellicoe* (7); in which the debtor covenanted to pay his debts by instalments of £10 every three months, and the time of full payment might, therefore, be much more prolonged. In *Latham* v. *Lafone* (8), the deed was a mere letter of license; it provided no composition, and contained no covenant for the payment of debts.

(1) This Order directs that—"Together with every deed or instrument left after the 5th day of June next, at the office of the Chief Registrar, for the purpose of being registered under sect. 192 of the *Bankruptcy Act*, 1861; and in addition to the affidavit or certificate required to be delivered to the Chief Registrar under the 5th condition of the said section, there shall be delivered to the Chief Registrar a copy of such deed or instrument, certified by the attorney or solicitor attesting the execution of the same by the debtor to be a true copy, and also, and as near as may be, in the form in the schedule hereunder written, *a full account of the debts of the debtor, which shall respectively amount to* £10 and upwards, together with the names, in alphabetical order, and the residences of his creditors, distinguishing those who have in writing assented to or approved of the deed, and such account shall be accompanied with an affidavit by such debtor verifying the same."

(2) Law Rep. 1 Ch. 616.
(3) Ibid. 1 Ex. 91.
(4) Ibid. 1 H. L. 9.
(5) Ibid. 1 Ex. 112.
(6) Ibid. 1 Q. B. 412.
(7) 3 H. & C. 263.
(8) Law Rep. 2 Ex. 115.

Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, for the official liquidator:—

First: *King* has submitted by allowing himself to be put on the list of contributories. By sect. 77 of the *Companies Act*, 1862, the assignees of a bankrupt contributory assume his liability, and *King* ought at once to have proved his deed to the official liquidator. It is against the rule of the Court that a man who allows the right time for bringing forward a short defence to pass by, should be permitted to avail himself of it afterwards. Secondly: The deed does not comply with clause 5 of sect. 192, as read in connection with the order of the 22nd May, 1862, which in reality forms part of it. If a debtor may omit a debt of £90 he may conceal debts to any amount, provided they do not affect the proportion of assenting creditors; there is no case in which the omission of a debt has been held to be unimportant. The full disclosure of all debts is most necessary, both as affecting the discretion of the other creditors, and as shewing the registrar whether the forms have been properly complied with. And it is not necessary to apply to set aside the registration of a deed before questioning the fulfilment of the conditions imposed by the Act: per *Knight Bruce*, L.J. in *Ex parte Godden* (1). Thirdly: The deed is unreasonable. It is a mere letter of license. The creditors receive nothing except the possible benefit of waiting; but in all the cases referred to they gained something either in suretyship or otherwise. In *Johnson* v. *Barratt* (2) it was said, by *Bramwell*, B., that such an arrangement might be good if the creditors obtained the additional liability of a surety. Here they have no such benefit. There is, moreover, no possibility of proving a debt not included in the schedule. Even if the deed be good as to the calls made in 1864 and 1865, it is bad as to the last call. There is no covenant to pay any debt not *solvendum in præsenti*, for interest is to run from the date of the deed. *Williams* v. *Harding* (3) arose under a different Act.

The VICE-CHANCELLOR:—How do you distinguish *Stone* v. *Jellicoe* (4)?

Mr. *W. W. Karslake*:—There the debts were to be paid by

(1) 1 D. J. & S. 260.
(2) Law Rep. 1 Ex. 65. 11 Jur N.S. 1025
(3) Law Rep. 1 H. L. 9; 12 Jur N.S. 457.
(4) 3 H. & C. 263; 10 Jur N.S. 976

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instalments. That is important, because if any instalment was not paid the creditors would be remitted to their rights, and this recurred every three months. Here there is an absolute suspension of the rights of the creditors for two years.

Sir W. Page Wood, V.C.:—

Mr. *North's* exhaustive argument has anticipated all the objections to this application, except the first, mentioned by Mr. *Karslake*, that *King* is precluded from seeking protection by having omitted to get himself removed from the list of contributories. But there is nothing in the 77th section of the *Companies Act*, 1862, or elsewhere, which has this effect. That section merely says that the assignees of a bankrupt contributory shall be *deemed* to represent him for all the purposes of the winding-up, and shall be *deemed* to be contributories accordingly.

In considering whether the deed is reasonable, the large number of creditors who have assented to it is material. The Legislature seems to have said that if a majority of the creditors in number, representing three-fourths in value, agree, the remainder shall be bound, provided certain conditions are fulfilled. In this case every condition imposed by the Legislature is fulfilled. It was argued that the deed was unreasonable, because, though it covenants for the payment of the debts at the end of two years, it is in reality a mere letter of license for that time, and the creditors gain nothing by it. But that is not true. They, at least, have the benefit of a covenant instead of a simple contract debt. And it is strictly within the words of sect. 192. It is a deed made between a debtor and his creditors, and relating to the debts and liabilities of the debtor and his release therefrom.

I cannot regard "unreasonableness" as meaning more than this, that if the majority of the creditors attempt to secure any advantage over the minority, the deed is bad. The case of *Stone* v. *Jellicoe* (1) is a strong one, for there the debtor covenanted to pay only £40 per annum in discharge of his debts; but the requisite majority of creditors consented, and the deed was held good. How can I distinguish the present case from that? Can I say that the

(1) 3 H. & C. 263; 10 Jur. N.S. 976.

delay of payment for two years makes the deed unreasonable? The creditors must judge of that.

Then, as to the non-compliance with the Order of the 22nd May, 1862. It was argued that, by the omission of this debt, the debtor had deceived the Registrar and the Court of Bankruptcy. That is a proper subject for the Court of Bankruptcy to consider, when they deal with the registration. But in dealing with the question here, I must draw a distinction between the rules of the Court of Bankruptcy and the Act of Parliament. I have only to read through sect. 192 to see whether I have a deed. The Court of Bankruptcy may consider whether, having regard to the general order, the deed should be registered. Much may be said against making it a hard and fast rule that any omission should vitiate the deed, and I think it would be hard to hold this deed vitiated. But since it is registered, and produced with the memorandum of registration upon it, I cannot regard the omission of a debt as a matter for me to consider. There is nothing, however, in this course of reasoning to prevent my going behind the registration to inquire whether sect. 192 has been complied with.

It was also argued, that no proof could be made under the deed; but that is not true. By sect. 197 the creditors who are bound by the deed shall have the benefit of the Act as if the debtor had been adjudged a bankrupt, and the creditors had proved. The official liquidator must prove under sect. 75 of the *Companies Act*, 1862, and then, at the end of two years, he will be at liberty to sue upon the covenant.

The following order must therefore be made:—That all proceedings against *King* be suspended until further order, and that the official liquidator be at liberty to prove, as a debt payable by *King*, under the indenture of the 11th day of October, 1866, the amount of his liability for past and future calls, under sect. 75 of the *Companies Act*, 1862. No order as to costs, except that the official liquidator is to be allowed his costs in the winding-up.

Solicitors for Mr. *King*: Messrs. *Marshall, Westall, & Roberts.*
Solicitor for the Official Liquidator: Mr. *F. W. Dolman.*

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July 17, 19.

HAWKINS *v.* MALTBY.

Vendor and Purchaser—Shares in a Company—Sale and Purchase through Brokers—Succession of Sales and Purchases—Custom of the Stock Exchange—Ignorance of material Fact—Non-execution of Transfer by Transferee—Privity of Contract.

By the practice of the *London Stock Exchange*, the property in shares, when sold on the Exchange, is considered to pass from one member to the other, by force of the contract, without the execution of any transfer, until the settling-day arrives, when the broker of the original vendor calls upon the broker to whom he has sold to name the purchaser, and the name so furnished is inserted in the transfer deeds; the first purchaser paying to the original vendor, if the shares have fallen, the difference between the original selling price and the ultimate purchaser's price.

Plaintiff, the registered owner of shares in a company on which £5 had been paid, sold them on the *London Stock Exchange*, through *C.*, his broker, to *M.*, another broker. A few days afterwards, the Defendant, through his brokers, bought on the Exchange a different number of shares in the same company at a lower price; a call having been announced in the meantime, which threw down the value of the shares, but of which call the Defendant when he purchased was not aware. On the settling day, *M.*, on being called upon by the Plaintiff's broker, gave the name of the Defendant as purchaser, whose name was thereupon inserted in the transfer deeds as transferee, and they were executed by the Plaintiff, the consideration being left in blank. Afterwards, the Plaintiff's brokers, on receiving the purchaser's price, filled in the deeds with that amount; and having received the difference from *M.*, paid the Plaintiff in full, and handed the transfer deeds and share certificates to the Defendant, who took them away. The Defendant did not execute the transfers, or get himself registered; and, upon the company becoming insolvent and being wound up, a call having been made by the liquidator, the Plaintiff (who had paid the directors' call) filed a bill to compel the Defendant to take to the shares:—

Held that, as the Defendant bought the shares without knowledge of the call, the payment of which was necessary to enable him to become registered, and which he could not compel the Plaintiff to pay, the Plaintiff (being the legal owner) could not enforce an equitable title against the Defendant; and bill dismissed with costs.

Whether, apart from the special circumstances of this case, there is a privity between a vendor and the ultimate purchaser in a transaction of this nature—*quære*.

THE Plaintiffs, *Hawkins & Sylvester*, of *Oxford*, on the 21st of March, 1866, directed their brokers, Messrs. *Crowley Brothers*, of *London*, to sell for them forty shares in the *Imperial Mercantile*

Credit Company, Limited, which were then standing in the name of *Hawkins* alone. On the 22nd of March the *Crowleys* sent the Plaintiffs a sale note, purporting to have sold, on their account, forty shares (£5 paid up) for £202 10*s.*, and £2 commission, to *Mackenzie*, who was a broker.

On the 26th of March a call of £5 was made by the company, and the price of the shares fell.

By the custom of the *London Stock Exchange*, upon a sale, the ownership of shares is considered to pass from hand to hand, without any transfer being executed, until a particular day, called the "name day," arrives, when the name of the last purchaser is given to the broker of the original vendor, and his name is inserted in the transfer, which is thus made direct from the original vendor to the last purchaser.

This practice was followed on this occasion. On the 27th of March, which was "name day," *Mackenzie* directed *Crowley* to take instructions from *Butler*, another stockbroker, as to the name of the transferee. *Butler* gave the name of the Defendant *Maltby* as the purchaser, and of Messrs. *Wilkin* as his brokers, and directed *Crowley* to transfer the shares into the name of *Maltby*. *Crowley* accordingly prepared the transfer and sent it to the Plaintiffs, having inserted in the deed the numbers of the forty shares, but with the consideration in blank. The Plaintiffs executed the transfer and returned it to *Crowley*, who, having received from the *Wilkins* £145, with 15*s.* for stamp, filled up the amount of consideration with the sum of £145, and sent the transfers to the *Wilkins*. Having also received £57 10*s.*, the difference between £145 and £202 10*s.*, from *Mackenzie*, they, on the 29th of March, paid the £202 10*s.* to the Plaintiffs.

The company stopped payment on the 11th of May, and, on the 26th of June, a previous voluntary winding-up was ordered to be continued under supervision.

The bill was originally filed on the 3rd of August, praying that the Defendant might be decreed specifically to perform his contract for the purchase of the shares, to repay the call, and all future calls, to register the deed of transfer, and to cause the Defendant's name to be placed on the list of contributories instead of the Plaintiffs'; and for damages.

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On the 31st of August, a call of £5 was made by the official liquidator, and notice was sent to the Plaintiff *Hawkins*, who forwarded it to the Defendant's solicitor.

The Defendant, by his answer, filed on the 21st of September, said that, on the 26th of March, his stockbrokers, the Messrs. *Wilkin*, agreed to purchase for him 100 shares, and on the same day he received a bought note for fifty shares (£5 paid up) at £181 5*s*., and fifty at £175, making, with stamp, fee, and commission, £365 17*s*., which sum he paid. He received deeds, purporting to be transfers from the Plaintiffs, of forty shares, and had not executed them, or caused them to be registered; he had also received the share certificates.

On the 6th of October the Plaintiff *Hawkins* paid the liquidator's call of £200, and, on the 17th of December, he also paid the directors' call of £200, and £9 5*s*. 3*d*. for interest.

Wilkin said that he bought fifty of the shares from *Slade*, and fifty others from *Octavius C. Jackson*.

The Plaintiffs' contention was, that the Defendant was the real purchaser, and that he was liable on the shares. The defence was, that there was no privity between the Defendant and the Plaintiffs.

Mr. *G. M. Giffard*, Q.C., and Mr. *Townsend*, for the Plaintiffs:—

As soon as the deed was handed over, the purchase was complete. The Defendant took and kept the certificates, but refuses to execute the transfer.

If the company had been prosperous, and the shares had risen, we could not have recovered them from the Defendant. Our right was gone.

[The VICE-CHANCELLOR:—It appears that the real sale was to *Mackenzie*.]

But the Defendant's broker, *Wilkin*, adopted the Plaintiffs as his vendors.

It has been said that the directors have not assented to the transfer, but it is clear that, as between seller and buyer, it is the buyer's duty to get the directors' consent to a transfer. All the

seller has to do is to execute the transfer and hand it over. Here the purchaser has taken no step, and given no reason for his not doing so: *Stray* v. *Russell* (1); *Wynne* v. *Price* (2); *Paine* v. *Hutchinson* (3); *Evans* v. *Wood* (4); *Lindley* on Partnership (5).

There may have been a time when the Plaintiffs and Defendant severally had equities against other persons, but the acts of the Plaintiffs and Defendant have entirely removed those equities.

Statement of the consideration is not technically necessary to the validity of a deed. Would not the Plaintiffs be estopped from saying that this was not a deed?

No doubt, if there had been nothing but a bought note on one side, and a sold note on the other, there would have been no privity; but here the principals have been brought into contact, one paid the purchase-money, and the other executed the deed of transfer.

The custom of the *Stock Exchange* is to give validity to transactions of this kind.

This company is being wound up; and under a winding-up the Court has power to put the equitable owner of the shares on the list of contributories in place of the registered owner: *Ward's Case* (6); *Emmerson's Case* (7).

Mr. *Druce*, Q.C., and Mr. *Bush*, for the Defendant:—

It is impossible to collect from the evidence what was the contract between the Plaintiffs and the Defendant, or when it was made. There was no deed, for a transfer with the consideration money in blank is no deed. No contract can be made by bought and sold notes, unless the same person acts for both buyer and seller.

[The VICE-CHANCELLOR referred to *Tayler* v. *Great Indian Peninsula Railway Company* (8).

In that case the transferee's name was left in blank.

(1) 5 Jur. (N.S.) 1295.
(2) 3 De G. & Sm. 310.
(3) Law Rep. 3 Eq. 257.
(4) M. R. 25 Jan. 1867.
(5) 1st Ed. vol. i. p. 508.
(6) Law Rep. 2 Eq. 226.
(7) Ibid. 231.
(8) 4 De G. & J. 559; 28 L. J. (Ch.) 285.

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The facts shew a series of independent equities between some persons, but no privity between the Plaintiffs and Defendant: *Chadwick* v. *Maden* (1).

The custom of the *Stock Exchange* is alleged. No doubt custom will mould a contract; but no custom will make a contract for parties who have not made one for themselves: *Shaw* v. *Fisher* (2).

Mr. *Giffard*, in reply.

SIR W. PAGE WOOD, V.C., after stating the facts, continued:—

The Defendant's brokers did not buy these particular forty shares of the Plaintiffs, nor did they buy this number of shares, nor did they buy at the price at which the forty shares were first sold. They bought shares generally in the rough sort of way in which these things seem to be done on the *Stock Exchange*. What I apprehend frequently takes place on the *Stock Exchange*, as is noticed by Lord *Cranworth* in *Shaw* v. *Fisher* (2), is this:—The shares pass from hand to hand until at last some one is found who takes them, after they have been through the hands of numerous brokers. In this case it stood thus: *Mackenzie*, having bought, is obliged to name somebody as purchaser. But others having bought from *Mackenzie*, through a second or third hand the shares have got to the Defendant. *Mackenzie* thereupon tells the Plaintiffs' brokers, "Here is somebody to take your shares," namely, the Defendant, who, in the meantime, has been buying through his brokers. The arrangement is something like that of the clearing house, and the matter is accommodated at last. So the Plaintiffs and Defendant are at length brought into contact. The Plaintiffs then execute what purports to be a deed of transfer; but as it is executed in blank as to price, it is of course no deed at all, but simply an agreement by the vendors to transfer. Then the question is, whether the Defendant, who took this deed and also the certificates of the shares from his brokers, is bound, under all the circumstances of the case, to take the shares.

The Defendant first insists that there is no privity between himself and the Plaintiffs, the original vendors. Undoubtedly upon

(1) 9 Hare, 188. (2) 5 D. M. & G. 596.

the original transaction there was not; but Mr. *Giffard's* argument, with which I agree to a certain extent, though not so far as to think that it carries the whole case, is this, that though the Plaintiffs did not in the first instance agree to sell to the Defendant, nor the Defendant to purchase from the Plaintiffs, yet when afterwards they were brought together, and the Defendant agreed to take the transfer, and carried away the certificates, he adopted the whole contract, and became the purchaser.

As an illustration of this view, the following case was put at the bar:—Suppose *A.*, the owner of a leasehold property, sells it to *B.*; and afterwards *B.* comes to *A.* and tells him that since his purchase he has re-sold to *C.*, and wishes the assignment to be made to *C.*; and suppose *A.* executes the assignment, and *C.* accepts it *simpliciter*. Then no doubt *C.* would, as was stated at the bar, be obliged to keep the property. That proceeds on the assumption that the deed is executed, and that *C.* has the legal estate vested in him. If, on the other hand, the legal estate is not vested in *C.*, and the matter stands only in the shape of an agreement, *B.* saying "I wish the property to be transferred to *C.*," and *C.* simply accepting the agreement, I am not so sure that the agreement thus transferred amounts to such a state of things as would enable the original vendor to file a bill against *C.*, the subsequent purchaser. I do not wish to express a clear opinion one way or the other as to how that case might stand. But what I take to be clear is, that if *C.*, the person who is supposed to be willing to take the advantage or the burden of the purchase, as the case may be, discovers that the thing presented to him is not in the state in which he thought it was when he agreed to purchase it—if there is any misapprehension, or anything on which he can fairly say that it would be inequitable that the contract should be enforced against him—he stands in a better position than the original taker under the first contract.

What has happened here is this: There was a sale of so many shares with £5 paid up. At the time when the Plaintiffs made their sale they could have compelled *Mackenzie* to take them. It was upon the 21st of March that they sold to *Mackenzie*, and the call was not made until the 26th. It is on that very 26th, at what hour or time we do not know, that the Defendant bought

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through his own broker certain shares. [His Honour stated the subsequent facts, and continued:—]

Now, it is one thing to say that the Defendant, having bought shares with £5 only paid on them, has no right to call on the Plaintiffs to give him shares with more than that amount paid upon them; and another thing to say that he is bound to pay a call coming due before he is master of the shares, and without paying which he cannot get the shares transferred to him. The statement in the answer is to this effect: "I believed the thing to be a solvent and good concern, but the very moment that the call was made, down went the shares." It is very true the deed was executed to him, and he carried it off, and with it the certificates, but he has never received a dividend, for there was none to receive; and he has taken no part in the company's transactions. In that state of things it appears to me that the Defendant would be entitled to say, even if the transfer were in the shape of a complete deed, "I am obliged to take your shares with £5 paid, it is true. I bought them of you, but I bought them without being informed of there being a call actually due and unpaid at the time of their being bought. I cannot register them without that call being paid: I cannot force you to pay it, and you cannot force upon me shares which I bought without any knowledge at all of the existence of the anterior call."

It is quite true, no doubt, as Mr. *Giffard* suggests, that a man must buy subject to the knowledge that there may be calls; but that is a very different thing from fixing him with constructive knowledge that there is a call due anterior to his making the purchase, which call, when it is actually made known, depreciates the value of the shares, and renders them such as he does not care to hold. He did not pay the call; he disregarded it. A second notice was sent, which he disregarded equally, and then the company broke up. I think in that state of things the Defendant is in a position in which he has a right to say, "I have not got the legal title to the shares, and you cannot enforce against me the acceptance of the equitable title under these circumstances. If the company had been prosperous, you would still have had no right to compel me to pay the call. As it is, I decline to pay, and you cannot compel me to pay it."

This being so, I must dismiss the bill, and as it is for a legal claim, and is brought instead of an action, I must dismiss it with costs.

Solicitors for the Plaintiffs: Messrs. *Hurford & Taylor.*
Solicitor for the Defendant: Mr. *James Crowdy.*

In re DONCASTER PERMANENT BUILDING SOCIETY.

Permanent Building Society—Winding-up—Liabilities of unadvanced Shareholders inter se.

By the rules of a permanent building society, established in 1850, it was provided that the ultimate value of each share should be £120, and the monthly subscriptions on each share 10*s.*; that members should join in successive batches, and that all members should continue to pay for the term of fourteen years, or till such time as each of the shares of the same date should have attained £120. It was provided that any shareholder who should be desirous of withdrawing might do so on giving one month's notice in writing, and such shareholder should receive back the subscriptions then paid, with interest at 5 per cent.; and that if more than one shareholder should give notice to withdraw at one time they should be paid in rotation according to priority of notice. It was also provided that the funds of the society should belong to the members in proportion to the time they had been subscribers, and that no dissolution should be completed until the close and maturity of all shares then in existence.

Losses having been incurred through the frauds of a secretary, the society was, in March, 1865, wound up. All debts having been paid, there remained a surplus sufficient to pay each shareholder about 10*s.* in the pound on the value of his shares, according to the period of his subscription at the date of the winding-up order. A call having been made to adjust the rights of the contributories, *inter se*, upon summons by the official liquidator to discharge the order:—

Held, that the assets of the company belonged to the members *pro ratâ* according to their respective periods of subscription; that a call, in order to equalize the value of all the shares, was not necessary or proper; and order for call discharged.

THIS was a summons, on behalf of the official liquidator of the *Doncaster Permanent Building Society*, that an order made on the 21st of July, 1866, for the payment of a call of £12 per share on all the contributories, might be discharged so far as it related to the unadvanced shareholders.

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The call had already been discharged as to the advanced shareholders by an order made by His Honour on the 10th of November, 1866.

The society was a permanent society, that is to say, members might be admitted at any time, and their shares would be held to commence from the last preceding month of June or December. Each member was intended to go on paying a monthly subscription of 10*s.* a share for fourteen years, or until his share reached the full value of £120. Payments of 10*s.* a month for fourteen years, improved at 5 per cent. compound interest, amount to very nearly £120; but if the company should turn out prosperous, the value of £120 a share would be reached before fourteen years had expired; if, on the other hand, it should be unsuccessful, the 10*s.* payments would have to be continued for a longer period.

Ordinary, or paying, shareholders were called unadvanced shareholders; other shareholders who had borrowed money from, and mortgaged property to, the company, were called advanced shareholders. When a loan was made to a borrowing member, it was considered as if the society were advancing to the member his own share or shares in the society, taking from him a security.

By rule 17, it was provided that any shareholder who should be desirous of withdrawing any unadvanced share, might do so on giving one month's notice, and he was thereupon to receive back the subscriptions then paid, with interest at 5 per cent. according to *Jones's* tables.

In the previous report (1), will be found a statement of the more important rules of the society. The present argument mainly turned on the following:—

"Rule XII.—6. Shareholders (not having executed a mortgage to this society) continuing to neglect the payment of their monthly subscriptions until the fines thereby incurred shall equal all the subscriptions actually paid, shall thereupon cease to be members of this society, and shall forfeit all their interest.

Rule XXVIII.—1. That the funds of this society shall belong to the members in proportion to the time they have been subscribers, and at the end of fourteen years from the date of such share, &c.,

(1) Law Rep. 3 Eq. 158.

or when the accumulated subscriptions with the interest thereon shall attain the value provided by these rules, the holders of each unadvanced share, or part thereof, shall receive in full satisfaction of all claims on this society in respect of the same, the sum of £120 per share, £60 per half-share, &c., and thereupon cease to be members.

"Rule XXIX. That a meeting of the shareholders, specially convened for that purpose, shall have the power to fix and determine the period when this society shall be finally and completely dissolved, by a majority of at least three-fourths of the members present . . . . That no such dissolution shall be completed until the close and maturity of all shares then in existence."

Owing to the frauds of a secretary, who, in 1862, absconded with a sum of about £4000 belonging to the society, a winding-up became necessary, and an order to that effect was made on the 11th of March, 1863. It was at first contended in Chambers that advanced shareholders were not contributories, but His Honour held that they must be placed on the list. An order was then made authorizing the official liquidator to allow the advanced shareholders who had executed mortgages to the society to redeem their mortgages, and this had in all cases been done. All debts due to third parties had been paid, and there was now standing to the official liquidator's account a sum of £9065 3*s.* 2*d.* consols, which would pay to all the shareholders about 10*s.* in the pound *pro ratâ* on the value of all their shares at the date of the winding-up order.

On the 21st of July, 1866, a call of £12 per share was made, under sect. 102 of the *Companies Act*, to adjust the rights of the shareholders *inter* [illegible]

This call, as to the advanced shareholders, was, as above stated, discharged on the 10th of November last.

The official liquidator, upon the present summons, contended that the call ought to be discharged also as to the remaining or unadvanced shareholders, on the ground that no call was necessary or proper, inasmuch as the remaining funds of the society, according to the rules, belonged to the members in proportion to the value of the shares at the date of the winding-up. He further deposed that he thought it necessary that the winding-up should

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be brought to a close, that none of the unadvanced shareholders who opposed the summons had taken the initiative, and that he had been instructed to take the present course by a resolution passed unanimously at a meeting of the unadvanced shareholders, at which 120 out of the whole number of 210, were present.

The summons was opposed on behalf of some of the unadvanced shareholders, who had subscribed for nearly fourteen years, and who contended that calls ought to be made till the funds of the society so raised were sufficient to pay off all the members the full value of their shares at the date of the winding-up order. The result of this would be that these shareholders would take much more out of the funds than they would get by a simple distribution *pro ratâ;* whilst the amounts which the unadvanced shareholders who had subscribed for short periods would receive out of the funds would be much less than what they have to pay for calls.

A preliminary objection was taken on behalf of the Respondents that the official liquidator ought to hold an even hand, and not appear to support the case of one set of the contributories against the rest; but the objection was overruled.

Mr. *Kay*, Q.C., and Mr. *Wickens*, for the official liquidator:—

We contend that a member of a permanent building society is not liable for anything except his monthly payments; he is not, like a member of a joint stock company, liable to contribute in order to adjust the rights of contributories, under the 102nd section of the Act.

Four states of circumstances may be supposed, in one of which a permanent building society must find itself when it comes to a stand-still: 1. It may have debts and no assets; or, 2. It may have neither assets nor debts; both of which cases are unimportant. But, 3. It may have no debts remaining, and a surplus of assets; or, 4. There may be a surplus of assets after paying back to every member his subscriptions in full.

Taking the last case first, we say the surplus would have to be divided among the members *pro ratâ*, according to the periods for which they have subscribed.

Then, supposing there is a failure of assets, surely the members

must contribute to debts upon the same principle as that on which they would have divided surplus.

The Winding-up Acts were not meant to, and cannot, apply to a case like this. The so-called "rights" of contributories must always be governed by the contract. This was not a trading partnership, but an association of persons who put money together into a box, on the understanding (rule 17) that they might withdraw it whenever they pleased.

Societies of this kind consist of two sets of members, one of them being persons desirous of subscribing money; the other, people desirous of borrowing. It is thought that these two opposite wishes may be brought into contact with mutual advantage; and the benefits to be derived by all are intended to be the same, as is shewn in this case by the provision (rule 14) that when the funds are not claimed by the borrowing members they are to be distributed by way of shares amongst the subscribing members, by lot.

The former decision was, in substance, a decision that this was not a partnership, for the advanced shareholders were discharged, taking with them an advantage, no doubt, but not the same *in specie* as the rest. If the advanced shareholders, when paid off, were held clear from further contribution, it seems to follow that the notion of a partnership must have been out of the question.

The whole point turns upon this, whether or not it was a principle (rule 17) that any shareholder might withdraw when he pleased.

Mr. *Amphlett*, Q.C., and Mr. *W. A. Clark*, for the opposing shareholders:—

If this contention be good for anything, the whole of the former argument was thrown away. The Court decided that advanced shareholders were not contributories for the sake of adjusting the rights *inter se*; but if none of the shareholders are contributories, the distinction so elaborately taken was wholly unnecessary.

There is a distinct obligation contained in these rules, that every member shall contribute for fourteen years, more or less (rule 12, sect. 4), until his share be worth £120.

There is, no doubt, a provision as to withdrawal (rule 17,

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sect. 1), but as possibly more members may wish to withdraw than there are sufficient assets to pay, the permission is qualified by the next section. If there are no assets to pay the retiring member, he becomes, no doubt, a creditor of the society. The rule about retiring is one which contemplates the society carrying on business. It does not contemplate the case of a society being wound up in this Court. A winding-up is the same as if all the members were to give notice of withdrawal at once.

The decision of the Court as to advanced shareholders does not affect the question of partnership in the slightest degree. It only went to this, that according to the contract (rule 28, sect. 2), the holders of advanced shares were, upon redemption, to cease to be members. There can be no doubt that this society is within the preamble of the *Companies Act*, 1862.

It has been argued that profits would be divided rateably, but there is no such thing in the system of the society as making a profit. The only effect of success would be to shorten the period of subscription.

We submit, therefore, that everything must go on until the full value of £120 is paid up on every share. If any members wish to withdraw, they can do so (rule 17, sect. 1), if there happen to be assets to pay them; here, the assets are not sufficient to pay them. Then calls must be made until the assets are sufficient.

Supposing there to be no assets and no debts, it would be extremely unjust that contributories who have subscribed nearly £120, should, because the society has happened to come to an untimely end, receive no contribution from members who have subscribed only a few pounds. The same rule must apply where there are assets remaining after payment of debts, although insufficient to pay all the shareholders in full.

The question is decided by authority: *Farmer* v. *Smith* (1); *Sparrow* v. *Farmer* (2); *Handley* v. *Farmer* (3).

The word "funds" (rule 28, sect. 1), does not mean only funds in hand; it includes funds which may have to be raised to meet withdrawals. No dissolution (rule 29) is to be completed until the close and maturity of all shares then in existence.

(1) 4 H. & N. 196. (2) 26 Beav. 511.
(3) 29 Beav. 362.

It has been said that this was not a society for profit. But it might have turned out prosperous, and then the members would have got £120 without paying for it.

As to the right of withdrawal (rule 17, sect. 1). In the first place, no one did withdraw, so the rule is inapplicable; but the winding-up order operates in the same way as a simultaneous withdrawal on the part of all the members; and as there is a voluntary power of paying in advance, so the Court has the power of insisting upon compulsory payment up to £120. In the second place, the winding-up order puts an end to the power of withdrawal. Thirdly, the winding-up more resembles a dissolution than anything else; and the Court must carry out the terms of the contract as closely as possible. Fourthly, these members must be regarded as creditors of the society in respect of the sums they have advanced. If this application should prevail, one shareholder will be paid out of the money of another, which will be opposed to the principle of *In re Anglesea Colliery Company* (1).

SIR W. PAGE WOOD, V.C.:—

The more I have considered this case, the more I am convinced that it is governed by the 28th rule, which provides that the funds of the society shall belong to the members "in proportion to the time they have been subscribers."

The present society differs from all others that I have had to consider, in the principle on which new partners are introduced into the concern. These persons enter into the partnership at different periods. It has been ingeniously argued that in a joint stock company also, members came in at different periods. But in an ordinary joint stock company the purchaser of a share stands in the position of the original allottee; and even when fresh capital is created by the issue of new shares, the holders of the new shares are let in to the capital of the company exactly as it already stands with regard to profits and losses.

In the case before the Master of the Rolls, *Handley* v. *Farmer* (2), all the members entered at the same time, and all formed one body. In one instance, no doubt, the advanced shareholder had been very backward in paying his subscriptions; still he was held

(1) Law Rep. 1 Ch. 555. (2) 29 Beav. 362.

12 Jur. N.S. 696

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entitled to redeem on payment of the fines for which he had become liable, and of his subscriptions to the end of the estimated period. The regulation which called upon all to pay equally was perfectly just, because all were equally partners, and all were held bound to contribute equally.

In this instance, I think, the 28th section enables the Court to do justice in the case. As I have observed, the members of this society were brought into it in successive batches. Now, suppose the society had incurred a heavy debt just before a new batch was introduced, it would manifestly have been inequitable that the new members should be brought in for the express purpose of paying off a debt over the incurring of which they had no control.

In this instance similar difficuties have arisen. But the 28th rule seems to have been passed to meet this sort of case. If this be not the meaning of the rule, it is difficult to see what the meaning of it was intended to be. The members of the society are not equal partners—they are very unequal partners. Ordinarily, no doubt, when a man enters a joint stock company, he does not participate in proportion to the time for which he has been a member. He participates in proportion to the number of his shares; because the value of each share which he has acquired is the same as that of every other share. In the case I have put last, if the shareholder pays on his share in advance, he stands in the position of a creditor to the company; and in almost all companies' deeds and articles there is contained a power to raise more capital.

But in this instance persons who come in are expected to pay a monthly subscription of 10*s.* for fourteen years, or until their shares shall equal £120 in value. Some of these persons have subscribed for more than seven years, some for less, and the 28th rule says that the funds shall belong to the members in proportion to the time they have been subscribers.

Then the question is, to whom do the remaining assets belong? Suppose that *A.*, representing half of the shareholders, have subscribed for fourteen years, and *B.*, representing the other half, have subscribed for seven years, and the funds have all been put into a common box, it follows that two-thirds of the fund will belong to *A.*, and one-third to *B.* If creditors have to be paid, one-half will suffer the loss of two-thirds of the debts, the other

half will suffer the loss of the remaining third. If it were otherwise a batch of new members coming in after debts had been incurred, would have to share it equally with the old members.

The fallacy of the opposite view of the case is this:—It is said, suppose the debts had been paid by a call upon all the shareholders equally, that would not fall upon the members rateably to their periods of subscription. But that argument is founded on a confusion of the rights of these partners *inter se*, and their rights as regards creditors. If the concern is dissolved, then, as to the rights of the members *inter se*, I cannot find any provision in these rules which says that these partners are to be called upon to do that which practically cannot be done, namely, to make up enough to give £120 to each of the shareholders.

The rule as to dissolution was not intended to come in force until the last batch of shares had matured. Here the whole thing is stopped by the *vis major* of a compulsory winding-up order, or they agree amongst themselves that the thing must be stopped, and it is stopped. On the one hand, I find a rule expressly stating that the funds are to belong to the members in proportion to their periods of subscription; on the other hand, I do not find a rule that in all cases they are to pay up to £120 a share.

I certainly shall not direct a call to be made under the Winding-up Acts.

The position of the official liquidator has, no doubt, been one of much difficulty. I do not know how he was to settle this question without coming to the Court, for I cannot hold that he was bound to keep this matter in suspense until an application came from the other side. I think that he has taken the proper course in bringing the matter forward as he has done.

The call, then, will be discharged; the costs will be taxed and paid, and the fund divided amongst the members *pro ratâ* according to the 28th rule.

Solicitors for the Official Liquidator: Messrs. *Van Sandau, Cumming, & Sons,* agents for Mr. *Fisher, Doncaster.*

Solicitors for the Respondents: Messrs. *Tippetts & Son.*

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KENT *v.* FREEHOLD LAND AND BRICKMAKING COMPANY.

Company—Rectification of Register—Misrepresentations of Fact in Prospectus—Omission of Facts—Fraud—Variance between Prospectus and Articles.

4 H.L. 70
10 Eq. 79, 89,
3 C.L.D. 731

By the prospectus of a freehold land and brickmaking company, issued in October, 1865, by the promoter and certain directors who had been induced to join in the project of starting the company by a bonus of £100 each, and the promise of £600 a-year remuneration money, it was announced that the capital was to be £25,000 in 5000 shares; that a dividend of 15 per cent. had been guaranteed for five years; that a freehold estate had been purchased for 6250; that one-half the required capital had been subscribed by the directors and their friends; and that *A.*, the land proprietor, had taken 500 shares. In the same prospectus were embodied reports of surveyors, which spoke of the land as the "property" and the "estate" of *A.* By the memorandum of association, registered on the 21st of November, 1865, the objects of the company were given as more extensive than those announced in the prospectus. By the articles of association it was stated that the company was established for the purpose of purchasing a particular piece of land for £6250, and that the directors were to pay the promoter, as a reimbursement for all costs, charges, and expenses of every kind, £1500. The facts were that no guarantee other than a verbal guarantee by the promoter was ever entered into; that in September and October, 1865, the promoter contracted with *A.* for the purchase from him of the land described in the prospectus and articles for £1500, of which £500 was to be paid in shares; and then verbally agreed with the directors to resell it to them for £6250; that the directors took only twenty shares each, and that the whole of the shares subscribed for did not amount to one-half of the capital.

Plaintiff having, on the 7th of November, 1865, applied for 100 shares, and paid £100 for deposit, £100 for allotment, and two calls of £100 each, filed the bill in October, 1866, against the company, the directors, and the promoter, seeking to have his name removed from the list, and to have the moneys returned, on the ground of fraudulent misrepresentation and suppression of facts. A petition for winding up the company, which had paid one quarterly dividend only, was presented in September, 1866, and a winding-up order was made in November following:—

Held, that the Plaintiff was not entitled to relief on the ground of failure of the promised guarantee, he having made no inquiry into its nature or existence; but that he was entitled to relief on the ground of the misrepresentations as to the amount of subscribed capital, and as to the purchase-money: and his name was ordered to be removed from the list of members, together with an account of receipts and payments, and repayment of the balance to him, with costs, against all the Defendants.

It is not open to a shareholder who has taken a dividend to complain that

the objects of the company, as stated in the articles, are more extensive than those stated in the prospectus.

Observations on the framing of a prospectus.

Affirmed 6 L. C. 3 Ch 493.

THIS was a motion for decree.

The bill was filed by *John Clarke Kent* against the *Freehold Land and Brickmaking Company, Limited, John Edward Panter, John Broderick Hartwell, Joseph H. Tilston, Edward Charles Lea,* and *Thomas Spargo,* praying that the register of members of the company might be rectified by striking out the Plaintiff's name; for a declaration that the Plaintiff's application for shares was obtained by fraud; for an inquiry whether any and what proportion of four sums of £100 were paid by the Plaintiff to, or for the use, or by the direction of, the company; for a declaration that under the circumstances alleged the Defendants *Panter, Hartwell, Tilston,* and *Lea,* had constituted themselves trustees for the Plaintiff of the same four sums, and that the company had also constituted itself trustee for the Plaintiff of so much of the same sums as had been paid to, or for the use, or by the direction of the company, and that all the Defendants were jointly and severally liable to repay to the Plaintiff such moneys, with £15 per cent. interest, being equivalent to the dividend represented by the prospectus to have been guaranteed, and that they might be decreed to pay such moneys to the Plaintiff by a short day; also for an account of what proportions of the same four sums had come to the hands of the Defendant *Spargo,* and for a declaration that he was liable, and might be decreed to make good to the Plaintiff what might be found due, with interest, and for an injunction to restrain an action for calls.

The bill alleged that shortly before November, 1865, the Defendants (other than the company) associated themselves together in the formation of the above-named company, and prepared and issued a prospectus, in which it was stated that the capital was to be £25,000, divided into 5000 shares of £5 each, the deposit £1 upon application, and £1 upon allotment. Then followed this statement: "A guaranteed dividend of not less than 15 per cent. for the first five years, and all profits above 20 per cent. will be carried to the freehold land purchase account."

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The names of Messrs. *Panter, Hartwell, Tilston,* and *Lea* were in the list of directors, and the following statements appeared:—

"This company has been formed for the purpose of purchasing a freehold estate in the neighbourhood of the town of *Arundel,* in the county of *Sussex,* on which has been discovered a valuable deposit of fine 'plastic clay,' well adapted for the manufacture of bricks. . . .

"The freehold has been purchased for the sum of £6250, subject to a royalty of 2*s.* 6*d.* per 1000 for bricks.

"The series of dividends of 15 per cent. will be payable . . . in quarterly succession.

"One-half the required capital has been subscribed by the directors and their friends; and the directors will allot the remaining shares in the order in which applications are received.

"A great evidence of the intrinsic value of the property, irrespective of the interest taken by the directors, is that Mr. *T. Spencer,* the land proprietor, has taken 500 shares, being one-tenth of the capital, and is engaged to supervise the works at a nominal sum of £150 per annum."

Then followed a report from a surveyor, which commenced as follows: "I have carefully inspected the property belonging to Mr. *Spencer,* situate in the parish of *Warningcamp,* in the neighbourhood of the town of *Arundel,*" and gave a highly favourable account of the situation and quality of the clay; and stated that 100,000,000 bricks would be produced at an aggregate profit to the company of £100,000. Another report by another surveyor followed, which spoke in highly favourable terms of the nature of the clay on "the two several parcels of 5A. 3R. 30P. and 2A. 0R. 36P. of land, part of the said estate of Mr. *Spencer.*"

The Plaintiff having seen the prospectus and other announcements, on the 7th of November, 1865, applied for 100 shares, and forwarded a draft for £100 to the company's bankers, as a deposit. On the 16th of November, a notice of allotment was received by the Plaintiff, who, on or about the 5th of December, paid a further sum of £100 to the same bankers. On the 3rd of January, 1866, he received a certificate for 100 shares. On the 3rd of February

he received notice of a call of £1 per share, and paid a third sum of £100 in respect of it on the 21st of February.

In the course of the same month the Plaintiff received a copy of a circular letter, marked "private," signed by *Edmund Smith*, describing himself as "a fellow shareholder," objecting to the call, and stating as follows: "I find that but little more than half the shares have been subscribed for;" and drawing attention to the circumstances that the "articles" provided for the payment to the directors of £600 per annum, and to the promoter of £1500. A circular letter, dated the 21st of February, 1866, was thereupon issued by the directors, stating that the number of shares was "sufficient to carry out the project (with economy) to a successful issue;" that each of the directors held and had paid for twenty shares, being the requisite qualification; and that the call and the directors' remuneration were strictly in accordance with the prospectus and articles.

On the 2nd of April, 1866, the Plaintiff received a first dividend of £6 14*s.* 11*d.*, with a letter in which it was described as "the first quarterly guaranteed dividend at the rate of 15 per cent. per annum on the amount paid" on the shares.

On the 14th of May, 1866, he received notice of a second call of £1 per share, and on the 1st of June he paid a fourth sum of £100 to the company's bankers.

A second quarterly dividend became due on the 16th of May, but was never paid.

On the 24th of July the Plaintiff received from the secretary, in answer to a request, a copy of the memorandum and articles of association of the company, registered on the 21st of November, 1865. From the memorandum it appeared that the objects of the company were "to purchase freehold, leasehold, or copyhold land in *England*, for the purpose of carrying on thereon the making of bricks, &c.; to carry on the manufacture of the articles above-mentioned, and for that purpose to purchase all necessary machinery, &c.; to freight ships, vessels, or barges; to contract with railway companies or other persons for carriage, &c.; and to purchase any freehold land, and also take on lease any property, for the purpose of carrying on the business of brickmaking, and the disposal of the articles manufactured, and also to sell and

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dispose of the same, or grant building or other leases, as may be deemed advisable." The seven subscribers were the Defendants *Tilston*, *Panter*, *Lea*, and *Hartwell*, *Charles Snewin* (the secretary, who subscribed for one share), the Defendant *Spargo*, and *John Shimmin* (who subscribed for ten shares).

The articles recited that the company was established, amongst other things, for the purpose of purchasing a piece of land in the parish of *Arundel*, *Sussex*, for the price of £6250, to be paid as follows: "the sum of £2250 within seven days after allotment of shares in the company, and the balance in such manner as might be agreed upon between the directors and the vendor, and subject to a royalty of 2*s*. 6*d*. for every 1000 bricks manufactured on the said property." The directors were to be entitled to set apart and receive for their remuneration a sum not exceeding £600 per annum; and they were empowered to "pay out of the funds of the company to the vendor the sum of £6250, the agreed purchase-money for the property, as before mentioned," and to "pay the said sum in such manner and form as they and the vendor may agree upon, and may enter into such arrangements as they may think fit for securing the royalty of 2*s*. 6*d*. to the vendor." Also, "out of the first moneys coming into their hands" to "pay to the promoter of the company, as a reimbursement and remuneration for all costs, charges, and expenses . . . of every kind soever incurred in and about the promotion and getting up of the company, and in respect of all other matters whatsoever, up to and including the allotment of shares, the sum of £1500."

The bill stated that prior to the 20th of July, 1866, the Plaintiff "had no knowledge whatever of the existence of such memorandum or articles," and that on the 24th of July his solicitor wrote demanding repayment of the £400, and interest at 15 per cent.; and alleged that the Defendant company was a wholly different company from that mentioned in the prospectus.

The bill stated that since the 20th of July, 1866, the Plaintiff had learnt that by some contract in writing, dated the 15th of January, 1866, Mr. *T. Spencer* agreed to sell, and the Defendant *Spargo* agreed to purchase, a small plot of land in the parish of *Arundel*, for £1500 in cash and £500 to be paid in shares; and that this plot of land was the same as that stated in the articles to

have been purchased for £6250; and that a secret bargain was entered into by the Defendants (the directors) and *Spargo*, that the sum of £4250, the difference, was to be divided between them in certain proportions.

Further, that no dividend of 15 per cent., nor any dividend, had been guaranteed, as stated in the prospectus.

Also that one-half of the capital of £25,000 was never subscribed by the directors and their friends, as represented in the prospectus.

That Mr. *Spencer* never applied for or accepted 500 or any shares or share whatever in the company, except so far as the £500 was concerned.

The bill charged that all the moneys received by the directors had been fraudulently appropriated in the following payments:— To *Thomas Spargo*, on account of the £6250 mentioned in the agreement recited in the articles of association, £2250; to *Thomas Spargo*, as promoter of the company, £1500; to the Defendants *Panter*, *Hartwell*, *Tilston*, and *Lea*, as remuneration for their services as directors, £300; to the purchase of certain shares in the capital of the company, £80; and in payment of the dividend, £302 16*s.* 3*d.*

On the 13th of August, 1866, the Plaintiff received notice of a third call of £1 per share, which he did not pay, and on the 4th of October an action was commenced against him. On the 8th of October he filed the present bill, charging fraud, misrepresentation, and suppression of material facts.

On the 12th of November, 1866, an order for winding up the company was made by the Master of the Rolls, upon two Petitions, one of which was presented on the 25th of September, and the other on the 18th of October.

The Defendant *Spargo*, by his answer, filed the 17th of January, 1867, said that he was the promoter of the company, and that in October, 1865, he requested the Defendants, *Panter*, *Hartwell*, *Tilston*, and *Lea*, to consent to take shares, and in order to induce them so to do, he offered to pay, and subsequently did pay, them £100 each. He admitted having prepared the prospectus.

He set forth a contract in writing, dated the 15th of January, 1866, following two others made in the September and October preceding, whereby it was declared that the Defendant *Spargo* had

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that day purchased a piece of land in *Arundel* for the sum of £1500 (not £2000, as alleged in the bill) and had paid a deposit of £50; and it was thereby agreed between *T. Spencer* and *T. Spargo* that the sale and purchase should be completed agreeably to the conditions of sale, as applicable to a sale by private contract, £500, part of the purchase-money, having been already paid by *T. Spargo* on account of shares in the company applied for by *T. Spencer;* the purchase to be completed on or before the 15th of February then next.

He admitted that this was the same property as that described in the articles of association; and said he paid Mr. *Spencer's* solicitor £50 in cash on the 15th of January, and £400, by a cheque, in April, 1866. He further said that he had, at *Spencer's* request, paid £1000 in respect of shares applied for by *Spencer* in the company; but that he did not pay this £1000 to the company in cash, but only by deducting the same from the money owing to him (*Spargo*) by the company.

He said the company did, through the directors, verbally agree with him for the purchase of all he had agreed to purchase from *Spencer,* and denied any agreement with the directors to participate in the difference between £6250 and £1500.

He said that he verbally agreed with the directors that he would secure during five years a dividend of 15 per cent. by depositing with them in trust for that purpose a sum of £1000, but such sum never was deposited, because the purchase had never yet been completed.

He admitted that the whole of the subscriptions fell very far short of one-half of the entire capital, but not of the "required" capital mentioned in the prospectus; and that only 1500 shares were ever allotted, including Mr. *Spencer's* 500, and 239 allotted to himself.

He admitted that he had never paid anything to the company, and that sums amounting to £6966 had been paid by the company to him.

He was willing that the £302 16*s.* 3*d.* should be placed to his debit, as against the £1000 agreed to be deposited by way of guarantee.

The Defendants, *Panter, Hartwell, Tilston,* and *Lea,* by their

answer, filed the 18th of January, 1867, denied having had anything to do with the preparation of the prospectus. They admitted having received £100 each from *Spargo*, and £300 for remuneration money.

A motion made on the 15th of November, 1866, to have the Plaintiff's name removed from the register, and for an injunction, was ordered to stand to the hearing; and the present application was made both in the suit and under the 35th section of the *Companies Act*, 1862.

Mr. *G. M. Giffard*, Q.C., and Mr. *Locock Webb*, for the Plaintiff:—

The Plaintiff was induced to take the shares by the following fraudulent misrepresentations:—1. That payment of the 15 per cent. dividend was guaranteed; 2. That the freehold had been purchased for £6250 and a royalty; 3. That one half the capital had been subscribed by the directors and their friends; 4. That *Spencer* had taken 500 shares, irrespective of the interest taken by the directors. These are sufficient to bring the case within *Ross* v. *Estates Investment Company* (1); *Smith's Case* (2); *Central Railway Company of Venezuela* v. *Kisch* (3).

There was also material variance between the articles and prospectus.

Mr. *W. M. James*, Q.C., and Mr. *Cracknall*, for the company and the official liquidator:—

The bill was not filed till after one of the winding-up Petitions was presented.

The Plaintiff has come too late: *Wilkinson's Case* (4). Even fraud may be condoned by a shareholder.

In so far as the Plaintiff asks relief on the ground of variance, he has mistaken his remedy: *Stewart* v. *Austin* (5).

Mr. *Kay*, Q.C., and Mr. *J. Napier Higgins*, for the directors.

Mr. *Druce*, Q.C., and Mr. *F. J. Wood*, for *Spargo*:—

The agreement for a guarantee was prepared, but never executed,

(1) Law Rep. 3 Eq. 122.
(2) Ibid. 2 Ch. 604.
(3) Law Rep. 2 H. L. 99.
(4) Ibid. 2 Ch. 536.
(5) Law Rep. 3 Eq. 299.

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because the company were not in a position to complete their purchase. *Spargo* admits his readiness to be debited with the £302 16*s.* 3*d.*

As to the purchase of the freehold, *Ross* v. *Estates Investment Company* (1) does not apply, inasmuch as *Spargo* had an equitable, if not a legal title. The price was set out in the prospectus.

As to the capital, it is only the "required" capital that is spoken of, not the actual capital.

It has never yet been held that it is incumbent to state in a prospectus the whole amount that directors may have agreed to give a promoter. The question is, how far a prospectus is defective in not stating all the arrangements connected with the formation of a company.

[The VICE-CHANCELLOR, at the close of the Defendants' argument, said he would consider the case, and possibly reserve his judgment till after the decision of the House of Lords in *In re Overend, Gurney, & Co., Limited.* If necessary, he would hear the reply.]

Aug. 3. SIR W. PAGE WOOD, V.C.:—

When this case stood over, the question was, whether or not Mr. *Giffard* should reply.

It now appears to me that no reply is necessary. The only question on which possibly I might derive some light from the important case of *In re Overend, Gurney, & Co.*, now pending in the House of Lords, is that of the time and delay which have occurred in this case. But the point really does not seem to arise here, inasmuch as that which is one of the principal frauds alleged in this case, I mean the enormously enhanced price at which this land was sold by the promoter to the company over that which he gave for it, and which, in other words, was simply promotion-money, was not known to the Plaintiff, at all events until very shortly before the suit was instituted.

The facts of the case are these:—The Defendant, *Thomas Spargo*, is minded to get up a company, and with that view he looks first

(1) Law Rep. 3 Eq. 122.

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into the land market for some land, and buys about eight acres for £1500, which was probably a tolerable price, it being said to contain not otherwise than valuable brick earth. Having purchased the land for £1500, he goes into the director market, and he buys six directors by giving them each £100. A further engagement was that they should have £100 a year. I think there were only five appointed, but six were contemplated. There was, therefore, to be paid to them £600 a year for their labour. Having done that, he and the directors put their heads together to frame a prospectus. I say "he and the directors," because there is no doubt the prospectus was framed by *Spargo*, and assented to by the directors. *Spargo* says it was distinctly with their assent; they are not quite so frank in their admissions; but they must be held answerable for the statements it contained.

The prospectus was advertised in November, 1865. Then the facts are, that *Spargo*, having given £1500 for this land, makes a sort of private arrangement (there was no written agreement) with the directors, as agents on behalf of the company (they having received from him this gratuity of £100 each, and the promise of £600 a year), that the company should give him £6250 for the land, for which he had agreed to pay only £1500. It is afterwards inserted as a stipulation in the articles of association that the directors are to pay to the vendor out of the funds of the company this enhanced price, and a sum of £1500 to *Spargo* by way of promotion-money.

That scheme being arranged, what do they tell the public? First, that the capital is £25,000, divided into 5000 shares of £5 each. Then they mention that "a guaranteed dividend of not less than 15 per cent. for the first five years, and all profits above 20 per cent., will be carried to the freehold land purchase account." Then they announce to the world the names of the directors, *Spargo* not being one, and that the company "has been formed for the purpose of purchasing a freehold estate in the neighbourhood of the town of *Arundel*:"—[His Honour read the passage.] They describe this land in somewhat glowing colours, but I will assume that the description is not overstated. Then they go on to say that "the freehold has been purchased for the sum of £6250, subject to a royalty of 2*s.* 6*d.* per 1000 for bricks." That royalty was to be paid

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to *Spargo* in addition to the promotion-money. The truth was, that the freehold had been purchased for £1500. Although the agreement did not exist in its present form until January, I think an agreement had been come to in October sufficient to justify the statement that the land had been purchased. At this time the articles, which speak of this sale for £6250, and which, it is said, ought to be treated as an agreement, because they were signed by *Spargo*, were not registered.

Then the prospectus goes on to say that "one-half the required capital has been subscribed by the directors and their friends." Now, the capital had been stated at £25,000, and not a quarter of that had been subscribed for. Then it goes on to say :—"A great evidence of the intrinsic value of the property, irrespective of the interest taken by the directors, is, that Mr. *T. Spencer*, the land proprietor, has taken 500 shares, being one-tenth of the capital, and is engaged to supervise the works at a nominal sum of £150 per annum." Mr. *Spencer* is the man who sold the land to *Spargo* for £1500, and I must take him to be the man who is represented by the prospectus as having sold for £6250, because it says that "Mr. *T. Spencer*, the land proprietor," has taken 500 shares.

Then some reports of land surveyors are set out. The first says, "I have carefully inspected the property belonging *to Mr. Spencer*," and then speaks of its high quality. Then there is another report about this "estate" of "Mr. *Spencer*." No vendor appears on the face of the prospectus but "Mr. *Spencer*," and we have statements that the land has been bought for £6250, that valuations have been made of the "property" of Mr. *Spencer*, and that the "proprietor" (who is undoubtedly Mr. *Spencer*) has taken these shares.

Now, three points have been laboured by the Plaintiff. One is, that a guarantee was spoken of, when, in truth, there was no guarantee. In reality, at that moment there was none. I will give *Spargo* the benefit of this observation, that he intended, out of the shareholders' own money, to return them as much as amounted to 15 per cent. for five years, and that he was prepared to enter into some agreement of that description. That would, no doubt, have diminished his promotion-money. I do not, on the whole, place much reliance on this guarantee point, because I think that

was a circumstance with regard to which the Plaintiff was put upon inquiry. I do not think a man who is told he is to be guaranteed, and takes no trouble to inquire into the validity of the guarantee, is entitled to ask for assistance at the hands of this Court. The least to be expected of him is, that he should make some inquiry. Therefore I pass that by.

The second point is, as to the statement that half the required capital had been subscribed, and I think there is a great deal in that. I am happy here to be able to found myself upon the observations of the Lord Chancellor in the case of *Central Railway Company of Venezuela* v. *Kisch* (1), following those of Vice-Chancellor *Kindersley* in *New Brunswick and Canada Railway Company* v. *Muggeridge* (2). Any one reading the statement that half the "required capital" was subscribed, would suppose that by the "required capital" was meant the £25,000. The directors do not explain the phrase by saying, "We shall probably begin to work with less," or, "We may probably want a great deal less than £25,000 in order to begin the work." A very similar misrepresentation was referred to by the Lord Chancellor (3) in that case of Mr. *Kisch*. No doubt, in that case, it might have been said, that what a man can borrow may be regarded as "available capital," and that, therefore, the representation as to "available capital" included the company's borrowing powers. So here it may be said, "We have told the public that our capital is £25,000 What do we mean when we speak of required capital? It may mean half as much as we think it necessary to work upon when the company is fully carried out; or it may mean no more than £100, because that may be sufficient to start with." But the fact was, that not one-fourth of the £25,000 was subscribed when the prospectus was issued.

The third point is a much more serious one. I wish it were the law, although I am bound to say it is not, that everything which is to be given in respect of bonus and promotion-money should appear on the face of the prospectus. But this I do say, that a promoter, who is making between £4000 and £5000 by the sale of land to a company over what he gave for it, is not justified in representing

(1) Law Rep. 2 H. L. 99, 113. (2) 1 Dr. & Sm. 363.
(3) Law Rep. 2 H. L. 119.

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to the company that it had been bought for £6250, when in truth it had been bought for £1500. It appears that there had been a talk amongst these purchased directors (for so I term them) of giving the promoter this money, but they did not dare to put into the articles that he was to have between £4000 and £5000 in addition to the £1500 for promotion-money; they say he is to have £1500, and say no more. I cannot hold that the Plaintiff could have known this state of things, or that he was bound to inquire of Mr. *Spencer* what he sold the land for. He might have done so, no doubt: but I cannot hold that a person entering into a contract of this kind is to assume that such a fraud as this is about to be committed upon him.

Upon that there is a plain case for relief. No doubt the Plaintiff has taken the guaranteed money, and has gone on for more than a year, and has paid calls. Moreover, it is said that he received a warning in the shape of the circular letter from *Smith*. But the writer of that letter says, "I find that but little more than half the shares have been subscribed for;" and then he draws attention to the facts that the directors were to have £600 a year, and the promoter £1500. But "more than half the shares" is within the letter of the statement in the prospectus, and I cannot see that there was enough in that to induce the Plaintiff to file a bill.

I must hold the Plaintiff bound by the articles of association. I have always held that a person taking dividends cannot afterwards quarrel with the articles of association. He must know what the company is when he takes a dividend. Therefore I place no reliance on the argument that the articles were larger than the prospectus. He must be taken to have known all about the £600 remuneration-money, and the £1500 promotion-money, but he is not to be taken to have known about the sum of between £4000 and £5000 promotion-money. Nor do I find anything to shew me that he did know about it until very recently before the bill was filed.

As to the argument that the remedy for a fraudulent misrepresentation arising out of over-statement in a prospectus is a legal remedy—that is a very different thing from a case where capital has been employed in a way in which there was no authority to

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employ it. The former case is not fraud; the latter case is one in which the Plaintiff complains of having been misled by directors who have been bribed, and who paid this sum of money in consequence of having been so bribed; *Spargo* having got up the whole scheme, and the directors having joined him in it. The Plaintiff seeks relief against them all, and against them all he is entitled to relief; for *Spargo*, though not a director, concurred in the acts of the directors.

The decree will be, that the Plaintiff's name be removed from the list of shareholders; for an account of what moneys have been paid by him to the company, and of what sums he has received, with interest on both sides, at 5 per cent.; then that the balance be paid to the Plaintiff, and that the Defendants pay the costs of the suit; with an injunction to stay the action.

Solicitor for the Plaintiff: Mr. *T. R. Kent.*
Solicitors for the Company: Messrs. *Stuart & Massey.*
Solicitor for the Directors and *Spargo:* Mr. *F. W. Snell.*

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Company—Debentures—Winding-up—First Charge—Bills of Sale Act—Costs.

The directors of a company registered under the Act of 1862, being empowered by their articles to borrow on debenture bonds any sums "necessary" for the business of the company, in December, 1865, issued twenty debentures of £100 each, all in the same form, by which they pledged "the property belonging to us for the time being during the subsistence of the debenture, with all the buildings and stock on, and connected with, our said property, and all the receipts and revenues to arise therefrom;" and declared that the entire debenture loan and interest should be a first charge on "our undertaking and property, and receipts and revenues aforesaid." The business of the company was to buy and sell land, to build, buy and sell houses, to furnish houses for hotels, and to carry on the business of hotel keepers. A winding-up order having been made, the liquidator proceeded to sell certain freehold and leasehold estate belonging to the company; but the purchaser refused to complete unless the debenture holders were satisfied. The debenture holders thereupon took out a summons in Chambers:—

Held, that the effect of the debentures was to give the holders a charge,

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in priority to other creditors, upon the land and other property of the company:

Held, further, upon the construction of the debentures, that they did not include the capital of the company, and that the issuing of them did not necessarily paralyse the business of the company, and was not, on that account, a transaction *ultrà vires*, or a breach of trust:

Held, further, that the non-registration of the debentures under the *Bills of Sale Act*, did not render them void as to the furniture and chattels, against the liquidator; though the winding-up was originally voluntary, continued under supervision:

Held, further, that after making all just allowances to the liquidator in realizing the fund, the debenture holders, applying by way of summons in the matter of the winding-up, were entitled to their costs, as well as to their principal and interest, out of the fund, in priority to all other charges.

THIS was a summons on behalf of certain creditors of the *Marine Mansions and General House Investment Company, Limited*, that out of the moneys realised by the liquidator, upon the sale of the leases of the *Belvidere Mansion* and *Victoria House*, and of the furniture, fixtures, chattels, stock, and effects, upon and belonging to the same premises respectively, he might be ordered to pay to the applicants, the *Worcester City and County Banking Company, Limited*, the sum of £2000, due to them as the holders of twenty debenture bonds, for £100 each, dated the 25th day of December, 1865, given by and under the seal of the company, and interest thereon at £8 per cent.

The *Marine Mansions and General House Investment Company, Limited*, was incorporated on the 21st of November, 1865, with a capital of £100,000 in 10,000 shares, with the following objects, as stated in the memorandum: "to erect, purchase, take on lease, or otherwise acquire and maintain, and to sell, let, exchange, or otherwise dispose of, freehold and leasehold house property, hotel buildings, land, furniture, or any share or shares, interest or interests therein, and to furnish such hotels, houses, or other buildings, for letting, either for lengthened or temporary periods; to carry on the business of hotel keepers and house agents; and to perform all such other acts and things as are incidental or conducive to the attainment of the above objects." By one of the articles of association the board was entrusted with the following, amongst other powers: "the borrowing on mortgage, debenture bonds, bills, or promissory notes, or otherwise, of any sums neces-

sary in the judgment of the board for the business of the company;" also "to complete the purchase of the leasehold properties known as the *Belvidere Mansion* and *Victoria House*, at *Brighton*, and the furniture, fixtures, and effects therein, subject to the payments, conditions, and agreements mentioned and contained in the draft contract for sale to the company."

The contract of which the draft was thus referred to, was afterwards embodied in a memorandum dated the 23rd of November, 1865, between *John Pope Cox* of the one part, and the company of the other part, whereby *Cox* agreed to sell and the company to buy, for the price of £8000, all the right and interest of *Cox* in a messuage and property called the *Longton Hotel*, stables and outbuildings, at *Sydenham*, and in two leasehold houses called *Victoria Mansion* and *Belvidere Mansion, Brighton*. The purchase-money was to be paid in the following instalments;—within seven days after the allotment of shares by the company, £600; on the 22nd of December, 1865, £4000; on the 24th of March, 1866, £1700; and on the 24th of June, 1866, £1700.

The company entered into possession of these properties, and afterwards carried on business at the *Longton Hotel*. Being in want of money, in December, 1865, they determined to raise £2000 by issuing the debentures in question, each of which was in the following form:—

"*Marine Mansions and General House Investment Company, Limited.*

"Debenture £100.

"No. 1.

"Issued under the authority of the articles of association, being portion of a loan of £2000, bearing interest at the rate of £8 per cent. per annum.

"We, the *Marine Mansions and General House Investment Company, Limited*, hereby acknowledge ourselves to be indebted to the bearer of this debenture of the principal sum of £100 sterling, £100 part of the above mentioned loan; which said principal sum we hereby promise to pay at the *Metropolitan and Provincial Bank, Limited*, to the bearer, on the 24th day of December, 1868, or at such time prior thereto as we may determine.

"And we hereby promise to pay the bearer interest at the rate

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of £8 per cent. per annum on the said principal sum until repaid, on the 24th day of June and the 24th day of December in every year, on presentation to our bankers of the coupons hereunto attached.

"And for the due payment of the said principal sum, and the interest thereon, we hereby pledge the property belonging to us for the time being during the subsistence of the said debenture, with all the buildings and stock on and connected with our said property, and all the receipts and revenues to arise therefrom.

"And further, we hereby declare that the entire debenture loan, and interest thereon, shall be and remain a first charge on our undertaking and property, and receipts and revenues aforesaid; and the debenture holders shall be entitled, as between themselves and us, and also as among themselves, *pari passu*, and and without any priority or preference one over another.

"The common seal of the company was hereunto affixed, in the presence of

"*James Vaughan*, } Two of the Directors
J. Miller Layton, } of the said Company.
J. Pope Cox, Managing Director.

"Dated the 25th day of December, 1865."

All these debentures were issued to a Mr. *William Thomas Adcock*, who advanced the £2000; and were by him afterwards delivered over for value to the applicants.

In May, 1866 (before the last instalment of the purchase-money fell due to *Cox*), an order was made for continuing under supervision the voluntary winding up of the company, which had shortly before been resolved upon; and Mr. *F. B. Smart* was afterwards appointed liquidator. He had since sold the *Belvidere Mansion* for £1240, and the *Victoria Mansion* for £1350. Upon the sale of the *Belvidere Mansion* being proposed to be settled, the purchaser's solicitors raised a question that the debenture bonds for the £2000 formed a first charge upon the assets, and refused to settle the purchase unless the claim of the holders was previously satisfied.

With regard to the circumstances attending the advance, Mr. *Adcock* deposed, that in December, 1865, *John Pope Cox*, whom he knew very well, called upon him and informed him that he had promoted the above company, and had sold them the *Longton*

Hotel, at *Sydenham*, and the *Victoria* and *Belvidere Mansions*, at *Brighton*; and that he was the managing director; and generally explained the objects of the company. He said that they were in want of money to carry on the several businesses, and requested the deponent to lend them £2000 upon their debentures, assuring the deponent that he should have a first charge upon all the buildings, and stock, and property of the company, and that the debentures would be such first charge, and an ample security. *Adcock* further said that he should not have lent the £2000 had he not been told by *Cox*, and believed, that he should have a first charge on the buildings, stock, and property of the company.

Cox made an affidavit, in which he admitted that he told *Adcock* that he should have a first charge on all the buildings, stock, and property of the company.

It appeared that the shares had not been fully called up, but whether the remaining calls would realize anything was doubtful.

Mr. *G. M. Giffard*, Q.C., and Mr. *H. F. Bristowe*, for the applicants:—

We claim a right of payment prior to *Cox*, and all other creditors of the company.

The questions are, what are our rights as debenture holders, and what is the result of the representations made by *Cox*.

The debenture is an acknowledgment under seal of a debt, and a promise to pay the debt and interest. It is then a "pledge" of the "property" of the company, and of "all buildings and stock on and connected with" the property; and of all receipts and revenues of the company. Lastly, it is a declaration that the entire debenture debt is a "first charge" on the "undertaking and property, receipts, and revenues aforesaid." It would have been impossible for the company, whilst it was a going concern, to sell, whilst such securities as these were out, without consent of the holders. Then, whatever may have been the nature and amount of the property of the company at its stoppage, our rights against that property are clearly paramount to those of ordinary creditors. The cases which have been decided on policies of assurance have no application to the present.

As between us and *Cox*, though, as against other creditors, his

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lien as vendor for unpaid purchase-money may still subsist upon the real property and its proceeds, we say that the debenture comprises the land, and, by purporting to give us a first charge, it excludes the lien. If not, the lien, as against us, was expressly waived by the representation made by *Cox* to *Adcock*.

As to the personal property, plant, stock, chattels, &c., as soon as a sale took place the vendor's lien was gone. It cannot attach to chattels which may have been subsequently bought with the purchase-money.

[The Vice-Chancellor referred to *Holroyd* v. *Marshall* (1).]

It cannot be said that these debentures are invalid on the ground of their not having been registered under the *Bills of Sale Act* (2). Bills of sale, though unregistered, are good against everybody except execution creditors and assignees in bankruptcy. A winding-up is not a bankruptcy, and a liquidator is not within the purview of the statute.

Mr. *Amphlett*, Q.C., and Mr. *Rudge*, for the liquidator, representing the other creditors and shareholders:—

The points are three:—

1. As to the proper construction of the debentures. 2. That the issue of the debentures, whether authorized in terms by the articles or not, was in law *ultrà vires*, and a breach of trust. 3. That, as far as the chattels are concerned, the debentures are within the *Bills of Sale Act*.

As to *Cox's* lien, we cannot contend against that, and we claim only the balance, after payment of his £1700.

First: As to the construction of these debentures, the objects of the company were—to buy and take on lease and to sell and exchange land; to buy, build, sell, and exchange houses; to furnish houses for hotels and lodgings; and to carry on the business of hotel keepers. This would necessitate a frequent buying and selling of land, as well as of goods. If the construction of the debentures be, as contended, to give the holders a first charge on these different kinds of property, the issue of the debentures must have paralysed the directors in the conduct of the company's

(1) 10 H. L. C. 191. (2) 17 & 18 Vict. c. 36.

business. Traffic in land and houses would have been impossible under such circumstances. The only reasonable construction is, that the debentures were to be securities for moneys actually advanced, and recoverable in due course of law, *i.e.*, after all the company's debts had been paid.

Secondly: the issue was a breach of trust, on the grounds above stated, and for the reasons assigned by Lord Justice *Turner* in the cases of *In re State Fire Insurance Company* (1), and *In re British Provident Assurance Society* (2). *King* v. *Marshall* (3) is to the same effect.

Thirdly: this liquidation, being voluntary, is equivalent to an assignment for the benefit of creditors under the 1st section of the *Bills of Sale Act*, particularly where the liquidator is acting under the supervision of the Court, and execution creditors can only get their remedies through his hands: *Companies Act*, 1862, sects. 92—94.

That companies making bills of sale must conform to the provisions of the Act is shewn by *Shears* v. *Jacob* (4), and *Deffell* v. *White* (5).

Mr. *E. Charles*, for the assignees of *Cox*:—

Mr. *Cox's* statement to *Adcock* did not amount to a waiver of his general lien.

[The VICE-CHANCELLOR said there could be no lien on the chattels.]

But the lien subsists as to the proceeds of sale of the land, and if these debentures operate, as we say they do, on the unpaid calls, we are entitled to say the debenture holders must marshal, *i.e.*, go against other securities than our land. We claim the benefit of all the arguments in favour of the debentures having a wide construction. It was held that the debenture in *King* v. *Marshall* did not include unpaid calls, or future calls; but the words there were, "all the lands, tenements, and estate of the company, and all their undertaking." Here the instrument extends to "all the

(1) 1 D. J. & S. 634, 641.
(2) 33 L. J. (Ch.) 535, 539.
(3) 33 Beav. 565.
(4) Law Rep. 1 C. P. 513.
(5) Law Rep. 2 C. P. 144.

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receipts and revenues;" and we say it includes arrears of unpaid, and also of future, calls. If this be the correct view, we ask for an inquiry.

Mr. *Giffard*, in reply:—

A liquidator is not an officer of the Court: he is rather a receiver of the company. In the case of a mortgage, the second mortgagee filing a bill may get a receiver, though the first mortgagee be a party; but that receiver is not the receiver of the first mortgagee.

[The VICE-CHANCELLOR:—There may be a winding up without a single creditor.]

This is not a "process" of the Court. Considering the nature of a liquidator's duties, the clause in the statute must be taken strictly.

SIR W. PAGE WOOD, V.C.:—

Upon the first point, which turns upon the construction of these debentures, I think, regard being had to the position of the company at the time they were issued, that there was an intention on the part of the company to do more than simply to say to the debenture holder, "You shall be paid out of our personal assets." I think that the instrument amounts to a specific charge and mortgage (the word used is "pledge") of the land and buildings of the company. Whether or not the company went too far in doing what they did is another question. The case is very different from that of *In re State Fire Assurance Company* (1), and I certainly think there was an intention to charge the real assets of the company, and to give the debtor something more than a mere personal remedy.

The objects with which this company was formed were to buy and sell houses. It was called the *Marine Mansions and General House Investment Company*, and its objects, stated at length, were as follows:—[His Honour read the extract from the memorandum of association set out above.] The directors had a very reasonable power given to them of borrowing "on mortgage, debenture bonds,

(1) 1 D. J. & S. 634.

bills, or promissory notes," any sums in their judgment necessary for the business of the company.

Suppose it was an individual instead of a company doing the same thing: speculating in the business of buying houses and using them as hotels, or selling them again as fast as he could. Being desirous to extend his business as much as possible, having bought property, he would mortgage it, in order to acquire more. That would be a perfectly legitimate course of proceeding. So this company proceeded to issue debentures, and they did so in the following form:—[His Honour read the form.]

Assuming the construction of one of these instruments to be, that it is a pledge of all the land of the company—supposing it confined to that—what is there to render it impossible for the company, having issued these debentures, to carry on its business? Would it prevent the company from shifting their property? I have no doubt that the directors would have had no difficulty in getting the debenture holders to concur.

But the instrument is not only a charge on all the lands and buildings, it is a charge on "all the receipts and revenues to arise therefrom." How would this charge impede the directors, if they wanted to acquire other property? They would either get the mortgage transferred, or deal with the debentures in some other way.

The decisions have certainly not gone the length of saying that such a charge would be illegal, or a breach of trust. Hundreds of gentlemen's estates in mortgage are not broken up so long as the interest is regularly paid; and there is nothing to prevent a business from being carried on, although its capital may be mortgaged.

Then, am I authorized in saying that this is a mortgage of the capital of the company? The language conveys no notion of a mortgage of capital, or of anything of that kind. The case of *King* v. *Marshall* (1), before the Master of the Rolls, was very different. Here the words are, "the property belonging to us, with all the buildings and stock on and connected with our said property, and all the receipts and revenues to arise therefrom;" and the debenture loan is to be a first charge "on our undertaking and

(1) 33 Beav. 565; 10 Jur. N.S. 921

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property, and receipts and revenues aforesaid." In the case before the Master of the Rolls it was a charge on "all the lands, tenements, and estate of the company, and all their undertaking." The words here manifest an intention of making this debt a first charge on this property, which does not include the capital of the company.

10 L.T. 342

With regard to the *Bills of Sale Act*, it appears to me that the first section does not aim at such a functionary as a liquidator. It speaks of assignees in bankruptcy or insolvency, or under any assignment for the benefit of creditors, and of "sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of law or equity." The true construction of these words I take to be, that the section strikes at cases of creditors who, by order of any Court of law or equity, have recovered judgment at law, and thus acquired a distinct right against the property in question. I think the case of a liquidator is not within the section. In a winding-up the liquidator acts not only for creditors, but for contributories, and for the company also. At the same time, the Legislature stopped short of saying that a winding-up should be a bankruptcy. The liquidator does not act more for the creditors than he does for the company. The object of the clause was to prevent a man from secretly availing himself of the statute to defeat his other creditors. I think a liquidator is much more in the position of an ordinary receiver, or even of a mortgagor who has executed a bill of sale, than of an execution creditor.

The only remaining question is that of *Cox's* priority. He, having a vendor's lien, and being managing director of the company, says to *Adcock:* "Here is a fine property, lend me some money upon it," and tells him he shall have a first charge. *Adcock*, on the faith of that statement, makes the advance, and takes the debentures. Nothing can be clearer than that *Cox* expressly waived his lien.

There will be a declaration that the debenture holders have a first lien on all the property of the company, real and personal, comprised in the debentures, with a reference to Chambers to settle the amount, and an order for payment; and then a declaration that *Cox's* assignees have a charge on the surplus, if any,

of the land; the costs of the liquidator to be paid out of the fund.

Mr. *Amphlett* asked that the liquidator's costs might come out of the fund in the first instance, and referred to *Armstrong* v. *Storer* (1).

Mr. *Giffard*, for the applicants:—

The rule is, that a mortgagee takes principal, interest, and costs. Except for the winding-up we might have filed a bill, and then there would have been no question.

[He referred to *Tipping* v. *Power* (2); *Ford* v. *Earl of Chesterfield* (3); *Wright* v. *Kirby* (4).]

Mr. *Amphlett*, in reply.

July 10. SIR W. PAGE WOOD, V.C.:—

The only point remaining to be decided in this case was, whether the mortgagee should be paid his principal, interest, and costs out of the fund, after deducting only the costs of realizing the property, and I am of opinion that he is so entitled.

The point seems to have been already decided by Vice-Chancellor *Wigram*, in *Tipping* v. *Power;* and the only authority which has been cited to the contrary is *Armstrong* v. *Storer*, before Lord *Romilly*. But I do not think that in substance the Master of the Rolls intended to depart from the principle of *Tipping* v. *Power*.

This is the case of a mortgagee who, not wishing to put the estate to the expense of a separate suit, does not file a bill, but takes the simple and proper course of coming in under the winding-up to have his rights decided by summons in Chambers. That is very different from the case before the Master of the Rolls, where the bill was filed for administration.

(1) 14 Beav. 535.
(2) 1 Hare, 405; Seton, pp. 291-2.
(3) 21 Beav. 426.
(4) 23 Ibid. 463.

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Mr. *Amphlett* says that the liquidator has incurred certain expenses in carrying on business so as to render the property fit for sale, and he has also paid some rent. I understand Mr. *Bristowe* does not object to these expenses being paid. The order, therefore, will give to the liquidator all just allowances in respect of his realizing the property, including the rent paid to the landlord.

Solicitors for the Applicants: Messrs. *Shirreff & Co.*
Solicitor for the Liquidator: Mr. *Edwin Howard.*
Solicitors for *Cox's* Assignees: Messrs. *Thomson & Son.*

WAKEFIELD *v.* DUKE OF BUCCLEUCH.

V.-C. M.

1866
Dec. 7, 8, 15.
1867
March 12, 13, 18, 19, 20, 21, 22, 23;
May 8.

Inclosure — Mines — Soil — Land sold for Expenses of Inclosure Act—Right to Vertical Support—Custom to let down Surface void.

Although the 32nd section of the general *Inclosure Act* (41 Geo. 3, c. 109) provides that every allotment set out and sold to pay the expenses of any local Inclosure Act shall be absolutely discharged of and from all common and other rights thereon or therein, and be vested in fee simple in the purchaser thereof, and be held in severalty as his private and absolute property; yet where a local Inclosure Act (in which the general Act was incorporated), after reciting that the lord of the manor was entitled to the soil of the wastes, and all mines and minerals thereunder, directed allotments to be sold to defray the expenses of the Act, and also directed certain parts of the wastes to be allotted to the lord as a compensation for his interest in the soil, and reserved to him all the mines and minerals under the lands directed to be divided and inclosed (except such as were devoted to public purposes):—

Held, that the reservation of mines to the lord extended to the allotments sold as well as to those allotted to the tenants of the manor:

Held also, that the local Inclosure Act had placed the purchaser of the land so sold to pay expenses, and the lord of the manor, in the ordinary position of one being the owner in fee of the surface and the other the owner of the minerals, with rights of user of the surface for the purpose of working the mines; but that the lord had no right to cause a subsidence of the surface, even although he could not work the mines at all without causing such subsidence, and injunction accordingly.

A custom as between the owner of the surface and the owner of the mines entitling the latter to cause a subsidence of the surface, if necessary in working his mines, would be bad and wholly void.

THIS suit was instituted by the Plaintiff claiming to be entitled to certain mines under some lands which had been sold under an Inclosure Act, and seeking an injunction restraining the lord of the manor and his lessee from continuing on his land and working the mines, or, in the alternative, from continuing so to work them as to cause a subsidence of the surface of his land.

The facts of the case were as follows:—The Plaintiff was the owner in fee simple of a parcel of land containing twenty-six acres, or thereabouts, situate in the manor of *Plain Furness*, in the County Palatine of *Lancaster*. The Defendant, the Duke of *Buccleuch*, was lord of the manor, and as such lord claimed the right to work the mines and minerals under the Plaintiff's land. The Defendant

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Kennedy was lessee of the minerals from the Duke of *Buccleuch*, and in that character was working, or proceeding to work, the minerals under the Plaintiff's land when this bill was filed. The Plaintiff claimed to be the owner not only of the surface of the land, but of all mines and minerals under it.

The land in question was part of the lands which were inclosed under the provisions of the 1 & 2 Geo. 4, c. 10, intituled, "An Act for inclosing Lands in the Townships or Divisions of *Kirkby Ireleth*, and of *Lindale* and *Marton*, in the Parish of *Dalton*, in the County Palatine of *Lancaster*." It was part of a larger piece which was sold, under the provisions of the Act, to one *Jane Towers*, for the purpose of raising money to defray the expenses of the inclosure, and was conveyed to her by an indenture of the 5th of October, 1831. It was admitted by the Plaintiff's counsel, and was stated in the bill, that the Plaintiff did not dispute the right of the Defendant, the Duke of *Buccleuch*, or his lessee, to work the mines and minerals under the lands allotted to the customary tenants of the manor, but the Plaintiff contended that the Defendants had no such right to work the mines and minerals under the lands sold for the purpose of defraying the expenses of the inclosure.

The 32nd section of the general Act 41 Geo. 3, c. 109, enacted, that in case it should be provided by any special Act that the expenses attending the same should be paid by sale of any part of the land to be inclosed, the Commissioner should mark and set out such part or parts of the waste or commonable lands as, in his opinion, would, by sale thereof, raise a sum of money sufficient to pay and discharge all such charges and expenses as might by any such Act be directed to be paid and discharged out of the same; and that the said Commissioner should sell such part or parts of the said lands, to any person or persons, for the best price or prices that could be gotten for the same, by private contract or public auction; and it declared that every allotment for which the full purchase-money should be paid should immediately thereupon be absolutely discharged of and from all common and other rights thereon or therein, and be vested in fee simple in, and be inclosed and thenceforth held in severalty by such purchaser or purchasers thereof respectively as his, her, or their private and absolute pro-

perty, and should be allotted accordingly by the Commissioner; and the section proceeded to provide for the application of the purchase-moneys in defraying the charges and expenses provided by the Act.

The 14th section of the same Act enacted that the several shares of and in any lands or grounds which should, upon any division, be assigned, set out, allotted, and applied unto and for the several persons who should be entitled to the same should, when so allotted, be, and be taken to be, in full bar of and satisfaction and compensation for their several and respective lands, grounds, rights of common, and all other rights and properties whatsoever which they respectively had or were entitled to in and over the said lands and ground immediately before the passing of any such Act; and the 40th section provided that nothing in such Act contained should lessen, prejudice, or defeat the right, title, or interest of any lord or lady of any manor or lordship within the limits whereof the lands and grounds thereby directed to be divided and allotted were situate, of, in, or to the seigniories, rights, and royalties incident or belonging to such manor or lordship, or to the lord or lady thereof, but the same (other than and except such interest and other property as were, or were meant to be, barred by such Act) should remain in as full, ample, and beneficial a manner as if such Act had not been passed. And by the 44th section it was provided that the general Act should be binding only so far as should not be otherwise provided in any special Act.

The local Inclosure Act, 1 & 2 Geo. 4, c. 10, after reciting in the preamble that there were in the several townships or divisions named in the Act, within the manor of *Plain Furness*, certain moors, commons, and wastes, and that the Duchess of *Buccleuch* was then lady of the manor, and as such was entitled to the soil of all the said moors, commons, and wastes, and to all mines, minerals, and quarries within or under the same, and reciting the general Act, appointed a Commissioner to put the local Act into execution, with, under, and subject to such of the powers, provisions, and directions contained in the general Act as were not repugnant to, controlled by, or otherwise provided for by any of the clauses of the local Act.

The 21st section of the same Act directed the Commissioner

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to assign, set out, and allot such parts of the moors, commons, and wastes thereby directed to be divided and allotted, as he should think necessary, as and for public watering-places, and to set out such springs or wells thereon or therein for the use of the inhabitants of the respective townships or divisions as he should think proper; and that such parts, springs, and wells should be vested in the surveyors of the highways.

By the 22nd section of the same Act it was provided that the Commissioner should set out and allot unto the surveyors of the highways, in some convenient part of the commons or waste grounds, such stone quarries as he should think necessary for making or fencing or repairing the public and private highways and roads, to be set out and appointed, and continued upon, through, or over the said moors, commons, and waste grounds thereby directed to be divided and allotted, and for the purpose of repairing all other public and private highways or roads within the said townships or divisions; and such stone quarries and the ground and soil thereof were thereby directed to be vested in the surveyors of highways.

The 23rd section of the same Act provided that the Commissioner should set out such part or parts of the moors, commons, and wastes, as in his judgment would be necessary to be sold, in order by sale thereof to raise a competent sum of money for paying the charges and expenses for obtaining and passing the special Act, and dividing and allotting the said moors, commons, and wastes, and all other charges and expenses whatsoever for or by reason of, or preparatory to, the said intended division and inclosure, and carrying the Act into execution; and to cause the said part or parts of the said manors, commons, and wastes to be set out for sale as therein aforesaid, to be sold in the manner and according to the directions contained in the general Act, and it provided that all the money arising from such sales should be applied by the Commissioner in defraying the several charges and expenses incurred under the Act. It further provided that proprietors of any allotments desirous of paying their share of the expenses in money might do so, and where any such payment was made the Commissioner should consider the same in setting out the allotment or allotments of the party or parties making such payment, and in

ascertaining the share or proportion of the said moors, commons, and wastes, so to be set out and allotted to such proprietors.

By the 24th section the Commissioner was directed, in the next place, to set out, allot, and award (after setting out the allotments thereinbefore directed to be made for the purposes thereinbefore mentioned), in two or more plots, unto and for the use of the lord or lady of the manor, and as a compensation for his or her right and interest in and to the soil of the said moors, commons, and wastes within the said townships or divisions, one full sixteenth part of the remainder of the said moors, commons, and wastes, such sixteenth to be over and above, and exclusive of, such shares, proportions and allotments of the said moors, commons, and wastes, as the lord or lady should be entitled to, as thereinafter mentioned, as an owner or proprietor of any messuages, cottages, lands, and tenements in the said townships.

The 25th section directed the Commissioner to set out, allot, and award to five ministers named in the Act such allotments of the said moors, commons, and wastes as, in his judgment, should be a full compensation and satisfaction for their rights of common.

The 26th section directed the Commissioner to divide, set out, and allot the residue of the said moors, commons, and wastes thereby intended to be divided and allotted unto and amongst the several owners and proprietors of messuages, cottages, lands, and hereditaments, the same allotments to be in full bar and compensation for their respective rights and interests upon the said moors, commons, and wastes.

The 28th section of the Act empowered persons entitled to any allotments of the moors, commons, and wastes thereby directed to be divided and allotted, to sell their interest therein before the execution of the award.

By the 29th section of the same Act it was enacted that all allotments to be made to the customary tenants of the manor of the said moors, commons, and wastes, should be and become estates of freehold in the parties to or for whom the same should be set out and allotted, to be holden of the manor in free and common socage, subject, and without prejudice nevertheless, to the rights of the lord or lady of the manor to all mines, minerals, and quarries in or under the same.

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By the 34th section it was provided that the expenses of the Act should be paid out of the proceeds of the sales directed to be made; and it was provided that, in case the money to arise by the sale of any such allotment or allotments as aforesaid should not be sufficient to defray the expenses provided for by the Act, then the deficiency should be made up by the several persons interested in the lands and grounds intended to be divided and inclosed, other than the ministers and surveyors in respect of the allotments provided by the Act to be made to them as such ministers and surveyors; and that the Commissioner should charge the owners of the said moors, commons, and wastes with such share of the expenses, as near as might be to the value of the allotments of common which such persons would be entitled to under the special Act, as he should think equitable, for the benefits to arise to them by the allotting and inclosing of the said moors, commons, and wastes.

The 43rd section of the Act, upon the reservations in which the case mainly depended, was as follows:—

"Saving, excepting, and reserving, unto the said *Elizabeth* Duchess of *Buccleuch*, and the person or persons for the time being entitled to the said manor, or to the said mines, minerals, and quarries, according to their respective estates and interests therein, all mines, beds, seams and veins of coal, lead, copper, tin, and iron, and other mines and minerals whatsoever, and all quarries of stone, slate, and flags, and other quarries whatsoever, already found or hereafter to be found, upon, with, or under the said lands or grounds, hereby directed to be divided and inclosed, or any part or parts thereof, with full and free liberty, power, and authority, to and for the said duchess, and the person or persons for the time being so entitled as aforesaid, and all persons licensed or authorized by her or them from time to time, and at all times for ever hereafter, and in all seasons of the year, to enter into and upon the said lands hereby directed to be divided and inclosed as aforesaid, or into and upon any of them, or every part or parts thereof (other than and except such part or parts thereof as may be so set out for stone quarries and watering-places for such purposes as aforesaid), to search, bore, and dig for coal, lead, copper, tin, ironstone, and all other mines and minerals whatsoever; and also to search and

dig for quarries of stone, slate, and flags, and all other quarries whatsoever; and to sink shafts, and open veins or quarries, in or upon the said lands, or in or upon any part or parts thereof (except as aforesaid), and to land such coal, lead, copper, tin, ironstone, slate, flags, and other minerals, to be so gotten as aforesaid, and to lay and deposit the same on the said lands or grounds, and to continue the same thereon so long as she, they, or any of them, shall think proper; and to lead, take, and carry away the same from thence with horses, carts, waggons, sledges, or in other manner, upon, through, or over the said lands, or any other of the customary lands within or holden of the said manor, and for that purpose to open gaps in any part or parts of the fences on the said several lands, and to make or continue horse and carriage and footroads in and upon and over the said several lands and premises, or any part or parts thereof, when, and so often, and so long, as she, they, or any of them, shall think proper or necessary, so that the said horses, carts, waggons, sledges, and other carriages, and the person and persons driving or attending the same, or to be employed in or about working the said mines and quarries, or otherwise relating thereto, may pass and repass at all times, and at all hours, to and from the said mines and quarries, or other works so to be erected, made, and opened, for the purpose of working the said mines and minerals, and for more easily and commodiously taking, leading, and carrying away from thence the said coal, lead, tin, ironstone, slate, and flags, and other minerals to be gotten in or upon the said lands, or any part or parts thereof (except as last aforesaid) without any interruption whatsoever; and also from time to time, and at all times hereafter, to divert and turn any rivulet or rivulets, brook or brooks, stream or streams of water, or other water, upon, over, and through the several lands, or any of them, for the better working the said mines, minerals, and quarries, or any of them; and to make proper cuts and sluices, heads, dams, or weirs, for that purpose, so as that the same shall not be injurious to any messuage or mill already erected; and also to sink and drive such, and so many, pits, quarries, levels, soughs, saflights, tunnels, saits, and other necessary works, within or upon the said lands so to be divided and inclosed, or any part or parts thereof (except as aforesaid), as she, they, or any of them, shall

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think proper or necessary for the better working and getting the said mines, minerals, and quarries; and to make, erect, set up, and continue, upon or within the said lands hereby directed to be divided and inclosed, or any part or parts thereof (except as aforesaid), such habitations for workmen, and others employed in or about the said works, and such mill or mills, smelting-houses, or other buildings or erections for smelting and refining, or manufacturing lead ore, copper ore, ironstone, tin, pyrites, and other minerals, as by her, them, or any of them, shall be thought necessary; and to erect, use, and employ such engines, water-wheels, sliding-rods, and machinery whatsoever, as she, they, or any of them, shall think fit, for better working the said mines, minerals, and quarries, or any of them; and for draining and carrying away the water and springs therefrom; and to dig and get clay, or any other materials to be used in any such buildings, erections, or works, as aforesaid; and also to do all further and other acts and things whatever for getting the said mines, minerals, and quarries, and carrying on the works thereof, and disposing of and carrying away the same, in as full and ample a manner, to all intents and purposes, as could or might have been done if the said lands had remained opened and uninclosed, or this Act had not been passed, without any interruption whatsoever, yet nevertheless making a reasonable compensation for damages done by such works as aforesaid to the person or persons sustaining such damage."

And the 44th section of the same Act reserved to the lord or lady any right to seigniories, royalties, or services throughout the manor.

1866. Dec. 7, 8. The *Attorney-General* (Sir *John Rolt*), Mr. *Shapter*, Q.C., and Mr. *Druce*, for the Plaintiff:—

There is a clear distinction in this case between the right to the mines and minerals under the land to be allotted to the customary tenants, and that which is to be sold for the payment of expenses. We do not dispute the right of the Defendant to the mines under the allotted lands, but the evident intention of the Legislature was, that the lands to be sold should be sold to include the mines. The intention was that the sale of the lands for payment of ex-

penses should be preparatory to the allotment. The local Act (1 & 2 Geo. 4, c. 10) directs that the Commissioner shall, in the first place, allot certain parts of the common lands for public watering-places, and allot other parts of the commons for stone quarries to make and repair the high roads; and the Act then directs that the Commissioner shall, "in the next place," set out such parts of the commons and wastes as he shall think fit, to be sold in the manner and according to the directions contained in the general Act, for the purpose of raising a competent sum of money for payment of the charges and expenses of obtaining the special Act, and dividing and allotting the lands among the tenants, and all other charges and expenses incurred preparatory to the intended allotment. The manner in which this land is to be sold is prescribed by the general Act, which, by the 32nd section, provides that the lands sold for payment of such charges and expenses shall be absolutely discharged of and from all common and other rights thereon and therein, and be vested in fee simple in the purchaser for his private and absolute property. The distinction between the lands allotted and the lands to be sold is evident. For the former no money was to be paid, but for the latter there was to be an absolute sale for a money consideration, and then the land was to be vested in the purchaser in fee simple, absolutely discharged of and from all common and other rights thereon and therein. There can be no meaning to the word "therein" unless it be to distinguish the mines and minerals from the surface land. This is made still more evident by the fact that under the 24th section of the special Act the Commissioner is to allot to the lord of the manor, as a compensation for his right and interest in the soil of the commons and wastes, one-sixteenth of the remainder of the lands. It was held in *Townley* v. *Gibson* (1), that a saving to the lord of seigniories, rents, and royalties was not sufficient to reserve mines under allotments. A grant of the soil passes everything under it, and mines are not a distinct right from the right to the soil. This view of the question was taken by the Commissioner himself, when he conveyed the lot to *Jane Towers* in fee without reserving the right to the minerals. In all ordinary sales of land, where the owner is entitled to the mines and minerals, and

(1) 2 T. R. 701.

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he sells the land in fee without reserving the mines, the latter will pass, and it is for the Defendants to shew that there is any exception in this case. There is nothing whatever in these Acts of Parliament to support the Defendants' claim. The land sold for the payment of expenses is to be conveyed to the purchaser in fee simple, discharged from all rights thereon and therein, while there is a distinct reservation in the 29th section with regard to the allotted lands, which are to be allotted "subject and without prejudice to the rights of the lord to all mines, minerals, and quarries in or under the same." The 43rd section, which contains the saving clause of the lord's rights, expressly refers to the mines and minerals under the lands thereby directed to be divided and inclosed; and the whole of that section is made to apply to the allotted lands only, and not to the lands directed to be sold. There is a palpable distinction between lands to be divided among persons having a common right, and the allotment and discommoning of lands. This was recognised in *Eddison* v. *Brookes* (1). A general saving is always held to yield to a particular provision, even where the general saving is sufficiently extensive to over-ride the particular provision, as in *Riddell* v. *White* (2). The Plaintiff purchased this land without any notice of the claim now raised. He gave such an amount of purchase-money as he considered it worth, if it included the mines and minerals; and if the Defendant is successful in his present contention, it will be a great injustice to the Plaintiff.

Sir *Roundell Palmer*, Q.C., Mr. *Baily*, Q.C., and Mr. *Freeling*, for the Defendant, the Duke of *Buccleuch* :—

The terms on which the Commissioner sold this land to the Plaintiff have nothing to do with the question; he had no estate in the land, but a mere power to convey, according to the provisions of the Act under which he was appointed. If he had no power to sell the mines and minerals, then the Plaintiff has no claim to them. The case of *Townley* v. *Gibson* (3) has no bearing upon this case, as it applied only to seigniories, rents, and royalties, and not to the actual right to the minerals. The surface and the minerals may be distinct and separate rights: *Humphries* v. *Brogden* (4). The distinction

(1) 17 C. B. (N.S.) 606.
(2) 1 Anstr 281.
(3) 2 T. R. 701.
(4) 12 Q. B. 739, 743.

between the two species of property is preserved throughout these Acts of Parliament, and no conclusion can be drawn from the effect of the words "divided, inclosed, or allotted," as they are used indiscriminately throughout the different clauses. In some of the sections the words are "divide and allot," in others "divide or inclose," and in others "divide, allot, and inclose," but they are used interchangeably, and are intended to mean the same thing. The same rights of surface are dealt with as regards the land to be sold and the land to be divided between the tenants having commonable rights. Whatever may be the construction of the general Act, that Act is controlled by the special Act. The preamble of the latter Act recites that the Duchess of *Buccleuch* was then the lady of the manor, and as such was entitled to the soil of all the commons and wastes, and to all mines, minerals, and quarries within or under the same, and, wherever it is requisite, the Act points to the reservation of these rights. In the case of *Pretty* v. *Solly* (1), the word "soil" was held to mean surface only, and the compensation to be given to the lord for his interest in the soil was independent of his other rights. No compensation is given to the lord for minerals which are reserved, but only for the surface. The 32nd section of the general Act, which directs the land to be sold in fee simple discharged from all common and other rights thereon and therein, could only apply to such rights as "seigniories, rents, and royalties," which were held, in *Townley* v. *Gibson* (2), not to include mines, and could never be intended to apply to mines which were admitted to belong to the lord, and were specially mentioned as reserved in some of the sections. If the mines were to have been sold, it would have been so specified in express terms, and not by the words "discharged from common and other rights thereon and therein." The 22nd section of the special Act directs that certain land shall be set apart for stone quarries, but this cannot be held to mean mines and minerals; nor can there be any question of repugnancy in such a grant, as was raised in *Hilton* v. *Lord Granville* (3), which was overruled by *Rowbotham* v. *Wilson* (4). The only intention of the Act was to divide the surface of the land between those persons who then

(1) 26 Beav. 606. (2) 2 T. R. 701. (3) 5 Q. B. 701.
(4) 6 E. & B. 593; 8 E. & B. 123; 8 H. L. C. 348.

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enjoyed rights thereon, and the mines and minerals in the land to be sold for expenses were quite as much reserved by the 43rd section of the special Act as they were in the divided lands. That section refers to all the lands intended to be inclosed. The whole of the lands were treated by the Act as an allotment, and the clauses refer to them all generally; and at the time of the passing of the Act it could not be known which land would be divided and allotted, and which would be sold for expenses. The plots are separated, and dotted about the estate, and it would be most unreasonable to take away from the lord his property in the minerals under any particular plot which might be fixed upon for sale. Such an injustice never could have been intended by the Act.

Mr. *Glasse*, Q.C., Mr. *Hardy*, and Mr. *Field*, for the lessee of the mines.

Mr. *Shapter*, in reply.

1866. Dec. 15. SIR R. MALINS, V.C.:—

The question raised in this case must be determined wholly upon the construction of the general *Inclosure Act*, 41 Geo. 3, c. 109, and the special Act under which the lands in question were inclosed. In the course of the elaborate arguments in the case it has been admitted that if the question had depended on the general Act alone, the Plaintiff, as owner of the soil, would have been entitled to all that was under it, or, in other words, to the soil down to the centre of the earth. But it is clear, and it is admitted on both sides, that the general Act and the special Act must be construed together, and with reference to the provisions of the latter which control the former; that is manifest from the concluding words of the preamble of the special Act. It has been strongly urged by the Plaintiff's counsel that the effect of the 32nd section of the general Act is to discharge all allotments which are sold for the purpose of defraying the expenses of the inclosure from all common and other rights thereon or therein, and therefore, to give the purchaser the most complete and absolute right to the exclusive

ownership of the land, and such would undoubtedly have been the effect of the sale of the land in question if the case had depended on that Act only. But that Act, as I have already said, is controlled by the provisions of the special Act, and the question in dispute really depends on the construction of that, rather than of the general Act.

Now, the preamble of the special Act recites that the Duchess of *Buccleuch* was then the lady of the manor of *Plain Furness*, "and as such was entitled to the soil of all the said moors, commons, and wastes, and to all mines, minerals, and quarries, of what nature or kind soever within or under the same."

It then proceeds with the usual provisions and enactments for carrying the contemplated inclosure into effect; and by the 24th section, it directs that a certain portion of the waste to be inclosed shall be allotted to the lord or lady of the manor as a compensation for his or her right or interest in and to the soil of the said moors, commons, and wastes, which are directed to be inclosed. Then, by the 43rd section, there is reserved to the duchess, "and to the person or persons for the time being entitled to the said manor, or to the said mines, minerals and quarries, according to their respective estates and interests therein, all mines, beds, seams and veins of coal, lead, copper, tin, and iron, and other mines and minerals whatsoever, and all quarries of stone, slate, and flags, and other quarries whatsoever, already found, or thereafter to be found, upon, with, or under the said lands or grounds hereby directed to be divided and inclosed, or any part or parts thereof." The minerals being thus reserved under all the lands directed to be inclosed, it is clear that the word "soil," in the 24th section, refers to the surface only, and that the allotments thereby directed to be made to the owners of minerals are in satisfaction of the surface rights to the land only. My view on this part of the case is in accordance with that of the Master of the Rolls in *Pretty* v. *Solly* (1), where his Lordship says, "I think the word 'soil' throughout the Act is used as equivalent to 'surface,' though if the question rested on the 27th and 28th sections alone, without the 58th, or saving clause, I should have held that the word 'soil' included the minerals, and that these sections deprive the

(1) 26 Beav. 613.

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lord of his right to them." And so I, myself, should have said in this case, that the word "soil" in the 24th section would have included the minerals if it had not been for the reservation contained in the 43rd section.

The minerals, then, being reserved to the lord under all the lands "hereby directed to be divided and inclosed," the question resolves itself into this, what are the lands by the Act directed to be divided and inclosed? It was argued by the Plaintiff's counsel that the lands sold to pay the expenses of the inclosure are not divided or inclosed under the Act; and in answer to this argument a minute examination of the language of the Act was entered into by the counsel for the Defendant, the effect of which I think was to shew that, whether the expression be "hereby directed to be divided," "divided and allotted," "inclosed and allotted," or "divided, allotted, and inclosed," the meaning is just the same, and that all these various forms of expression refer to the same lands, namely, those that are directed to be inclosed by the special Act.

There can be no doubt that the land sold to *Jane Towers* was part of that which the special Act directed to be allotted and inclosed; and as it was wholly uncertain when the Act passed whether such land would be allotted to a customary tenant or would be sold, it was still treated as an allotment under the Act; and it was expressly sold and conveyed as such by the deed of the 5th of October, 1831. It is remarkable that the general Act in the 32nd section, so much relied upon by the Plaintiff's counsel, and the special Act in the 34th section, treat the lands authorized to be sold as part of the allotments under the inclosure.

The Court is bound, if possible, to put a reasonable construction upon every Act of Parliament, and it must be admitted that the construction contended for by the Plaintiff, making the distinction between lands allotted to the customary tenants and those sold, would be most unreasonable and inconvenient, for while the object of the Act must, I think, in accordance with its express language, be to give the lord the right to the mines under all the lands to be inclosed, the contention of the Plaintiff would so interfere with and interrupt the exercise of the power of working the mines, that the lord would remain liable to be stopped whenever he worked up to the sold lands, such lands being very numerous, and going

down to very small quantities (in some cases even less than half an acre), and dotted about in various parts of the inclosure. The effect might thus be to render it practically impossible to work the mines at all. It was, however, argued that the reservation of the mines to the lord does not extend to the lands allotted for watering places under the 21st section, for stone quarries under the 22nd section, and to the ministers under the 25th section, but I do not find in the Act any warrant for this contention.

It is true that the 43rd section contains an exception of the lands set out for stone quarries and watering places; but that exception refers to the surface only, and merely restrains the lord from using the surface of those lands for mining purposes, obviously on account of that part of the surface having been devoted to other purposes. I am of opinion that the language of the 29th section, which enacts that all the allotments to be made to the tenants are to be made without prejudice to the right of the lord to the mines, is just as much applicable to the allotment, to the ministers, to the watering places, and the stone quarries, as to any of the others.

Upon a careful consideration of the whole Act, I am of opinion that the proper construction is to treat it as dealing with surface rights only, leaving the lord's right to the minerals untouched, and that what is authorized to be sold to pay the expenses is that which would otherwise be allotted to the tenant, namely, the soil or surface only, subject to the right of the lord to the minerals, as reserved by the 43rd section.

Upon these grounds I am of opinion that the Plaintiff's case for restraining the Duke of *Buccleuch* and his tenant from working the mines under the land in question wholly fails; and that the bill, so far as it seeks to restrain them from working them, must be dismissed.

The decision in the case of *Townley* v. *Gibson* (1), which was much relied upon by the Plaintiff's counsel, turned wholly on the ground that the mines and minerals were not reserved, and has no application to the present case. That that is so is plain from the language of Lord *Kenyon* and the other Judges who decided the case. It should be remembered that the question there was, whether the lord was entitled to the mines. Lord *Kenyon* says (2):

(1) 2 T. R. 701. (2) 2 T. R. 706.

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"We cannot narrow the words of this Act, and that transfers all the right in the soil to the several tenants. There is no doubt but that the mines might have been reserved. If it had been so intended, it would have been by express words; but there is no such reservation here. The word 'rents' is explained by the other words used; but those rights which are reserved are mere badges of royalty, incorporeal rights, and other fruits of tenure of the like sort." Mr. Justice *Ashhurst* says: "The object of an inclosure is, that the lord of the manor, in respect of his seigniory and waste, should have some part of the ground to be allotted to himself in lieu of his manorial right; and the other lands are allotted to the proprietors of the inclosed lands within the manor; and these are not made copyholds, but the grantees take them as freeholds of inheritance." Mr. Justice *Buller* and Mr. Justice *Grose* expressed themselves to the same effect, and it is obvious that that case turns wholly upon the fact of the minerals not having been reserved. Here the minerals are reserved, according to my view, under all the lands; and on these grounds I am of opinion that this part of the case is against the Plaintiff, and that, so far, the bill must be dismissed.

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March 12, 13, 18, 19, 20, 21, 22, 23. The VICE-CHANCELLOR having decided that the lord of the manor was entitled to the minerals under the Plaintiff's land, the case now came on for argument on the second point, namely, whether the lord or his lessee, Mr. *Kennedy*, was entitled so to work the mines as to cause a subsidence of the surface of the Plaintiff's land, the Plaintiff seeking by his bill an injunction to restrain them from so doing.

The sections of the Act on which the question turned will be found set out *ante*.

The evidence as to the nature of the mines was as follows: That they were of hæmatite or red ore; that the veins varied very much in thickness, some being not more than two or three feet thick, others as much as forty or fifty yards; and that the same vein would often vary very much between those figures. That the ore in some cases rose to within a few feet of the surface, and in other

cases was not found till after passing through from twenty to forty yards of superincumbent *débris*, consisting of gravel, clay, sand, boulder, stones, and other loose materials; that these, upon approaching the top of the vein, were more or less mixed with ore, and that there was no exact parting between the loose *débris* overlying the ore and the ore itself; that the rocks forming the walls of the veins were very much mixed with ore; and that strings or pipes of the ore ran several yards into the rock, making it rotten and unstratified.

On the question of the method of working the mines, and whether it was possible to work them without causing a subsidence of the surface, the evidence was very conflicting; the Defendant adducing witnesses who stated that it was impossible to work mines of the description in question without letting down the surface, and that a prohibition against letting down the surface would be equivalent to putting a stop to all mining in the district in question; while the Plaintiff adduced witnesses who not only stated that it was possible to work the mines without letting down the surface, but also suggested various modes of working by which, as they alleged, the object could be attained.

Various customs as to the mode of working the mines in the manor were alleged; but it is not necessary to refer to the evidence respecting them in this report.

The *Attorney-General* (Sir *John Rolt*), Mr. *Shapter*, Q.C., and Mr. *Druce*, Q.C., for the Plaintiff:—

The Court having decided that the property in the mines belongs to the Duke of *Buccleuch*, we still contend that the words of the 43rd section of the Act, that the allotment shall be absolutely discharged from all common and other rights thereon and therein, must have some meaning, and that, at any rate, the Duke has no right to enter and break up the surface of the land for the purpose of sinking shafts and erecting buildings for mining operations.

[The VICE-CHANCELLOR:—I have decided that the Duke has all the same mining rights under the whole of the land, whether sold or allotted, which he had before the passing of the Act. He is entitled to the minerals; he has a right to go upon the land and

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work the mines when he thinks fit, and may sink shafts where he pleases, and enter upon the surface of the land for that purpose in the ordinary way; but, of course, making any compensation for the damage that may be sustained by the owner of the surface.]

The only question will then be, whether the Plaintiff has a right to prevent the Defendants from so working the mines as to cause the surface to subside. The evidence is to the effect that a subsidence has already been caused, and if it be true that the mines, in consequence of their peculiar nature, cannot be worked without causing subsidence, we say that the Plaintiff has a right to stop the Defendants from working the mines at all.

The Plaintiff has, in the first instance, a right to support; such right is not an easement, but part of the freehold: *Backhouse* v. *Bonomi* (1); mines can only be worked so far as consistent with that right: *Caledonian Railway* v. *Sprot* (2); and such right is independent of the nature of the strata: *Humphries* v. *Brogden* (3). Absence of negligence in working is immaterial. *Brown* v. *Robins* (4); *Hunt* v. *Peake* (5); *Stroyan* v. *Knowles* (6); *Smart* v. *Morton* (7). Stipulations as to manner of working, and for compensation, do not alter the case: *Humphries* v. *Brogden*; *Harris* v. *Ryding* (8); *Roberts* v. *Haines* (9), affirmed on appeal (10); and even where there was an express provision against the mine owner being liable to make compensation for damage to surface, it was held that he could not interfere with the surface, and that any custom enabling him to do so would be bad: *Blackett* v. *Bradley* (11).

The existence of buildings and the amount of their weight is immaterial: *Brown* v. *Robins*. A grant to destroy the surface would be rejected as repugnant and absurd according to *Hilton* v. *Lord Granville* (12); and that decision was supported in *Marquis of Salisbury* v. *Gladstone* (13).

(1) 9 H. L. C. 503.
(2) 2 Macq. 449.
(3) 12 Q. B. 739.
(4) 4 H. & N. 186.
(5) Joh. 705.
(6) 6 H. & N. 454.
(7) 5 E. & B. 30.
(8) 5 M. & W. 60.
(9) 6 E. & B. 643.
(10) 7 Ibid. 625.
(11) 1 B. & S. 940.
(12) 5 Q. B. 701.
(13) 9 H. L. C. 692.

In *Richards* v. *Harper* (1) there was a grant, with covenant against liability for causing subsidence of surface, and it was held that the covenant did not run with the land. The right to support may be excluded wholly by express stipulations, as in *Rowbotham* v. *Wilson* (2), *Harris* v. *Ryding* (3), and *Bell* v. *Wilson* (4); or partially, as in *Elliot* v. *North Eastern Railway Company* (5); but in either case the right to support, being an absolute right, can only be taken away by express words, either negative, or which irresistibly import a negative: *Earl of Cardigan* v. *Armitage* (6); and affirmative words are not sufficient.

Amount of support must be co-extensive with the intended user of the property: any waiver of the right must be by express words: and the reservation of mines does not take away the right to support: *Berkley* v. *Shafto* (7); *Dugdale* v. *Robertson* (8); *Proud* v. *Bates* (9).

The 43rd section of the local Act is equivalent to a contract between the parties, but it relates only to what is to be done upon the surface, and not to any destruction of the Plaintiff's rights in the surface, and the damage referred to is only that which may arise from the right of entry. That section gives the Defendants no more right to let down the surface than they had before. If the lord sets up a right of user, we say that it was an unlawful user. Five customs are set up, but none are properly pleaded; customs must be pleaded precisely, and if pleaded too largely they fail: *Bacon's* Abridgment, "Custom," H.; *Wolley* v. *Hadfield* (10); *Bourke* v. *Isaac* (11).

Profits cannot be taken out of another man's land by virtue of a custom: *Constable* v. *Nicholson* (12). Custom is confined to easements, and the right to support is not an easement (13).

Some of the evidence goes to prove that the working cannot be effected without creating subsidence; but, on the other hand, there is evidence to shew that by a particular method of working it may be done without injury to the surface.

(1) Law Rep. 1 Ex. 199. 19 Jun 1865
(2) 8 H. L. C. 348. 6 Jun 1865
(3) 5 M. & W. 60.
(4) Law Rep. 1 Ch. 303. 12 Jun 1862
(5) 10 H. L. C. 333. 9 Jun 1865
(6) 2 B. & C. 197.
(7) 15 C. B. (N.S.) 79.
(8) 3 K. & J. 695. 3 Jun 1857
(9) 34 L. J. (Ch.) 406. 10 Jun 1865
(10) 3 Price, 210.
(11) 2 Ibid. 299.
(12) 14 C. B. (N.S.) 230.
(13) 1 Saund. 340 c, note (*e*).

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Sir *Roundell Palmer*, Q.C., Mr. *Baily*, Q.C., and Mr. *Freeling*, for the Duke of *Buccleuch*:—

The effect of the 43rd section of the special Act is, that the Defendant is entitled to the mines and minerals under the land, the surface of which belongs to the Plaintiff, but the Plaintiff's contention would in effect repeal that section. Before the *Inclosure Act* the whole of the soil was vested in the lord, together with the mines and minerals, as part of the freehold. The right to the mines was not a mere right to work them, but it was a seigniorial right. By the *Inclosure Act* part of the land was divided between the customary tenants and part was sold for expenses, and the Court has decided that it was only the surface rights which were sold. The construction of the 43rd section clearly is, that all the rights which the lord previously had are reserved after the sale and allotment. That right is not confined to entry upon the surface only. The buildings alluded to are those which were already erected, and the reservation is not extended to any buildings which may subsequently be erected. Such buildings would have no right to support. The lord is restricted from letting down the surface at the particular spots denoted as watering places, but there is no implication that it may not be let down elsewhere.

The Plaintiff's arguments proceed on error in law. The lord of the manor is (irrespective of custom) entitled to enter on the common lands and take the minerals and destroy part of the common, so that he leave sufficient for the commoners. The local Act reserves to the lord all his ancient rights.

The Plaintiff is in possession of part of the common, and must be treated as a commoner, and has not pleaded that the lord does not leave sufficient common, nor is any evidence adduced to that effect; and the onus of shewing that the lord is not to take the mines lies on the Plaintiff.

The lord may do anything not destructive of common rights: *Cruise's* Digest "Common" (1), and it is only the usual right of the lord which, in granting right of common, he does not give up, and which the passing of the Act does not take away: *Filewood* v. *Palmer* (2); in the report in *Melmoth* the words are added: "The

(1) 4th Ed. vol. iii. tit. 23, § 47, p. 73.
(2) 5 Vin. Abr. p. 8, § 33; S. C. Mose. 171; S. C. Melm. MSS. E. 53, *Lincoln's Inn* Library.

lord is absolutely entitled to the mine provided he leave sufficient common."

Persons taking surface rights and rights of compensation under an Act, take them subject to the terms of the Act, and the Plaintiff must shew that what is being now done could not have been done before the Act passed, the rights of the lord having been thereby reserved.

The commoners had no right to the soil, they had only a right to take the herbage by the mouths of their cattle. The lord has an undoubted right to open mines, and it is a question of damage for the tenant: *Bateson* v. *Green* (1). The lord's grant of right of common is subject to his own rights of mining. The lord says you may go on taking what herbage you can from the common by your cattle, but I am not to be deprived of my rights. The commoner would have a cause of action if the pasturage left were insufficient, but he must shew the damage, not in a particular spot, but as regards the loss of herbage over the whole manor: *Arlett* v. *Ellis* (2). The question then is, whether the Defendant is doing anything more than he had a right to do before the *Inclosure Act.* The allottees cannot be in a better position than they were in before the passing of the Act. They cannot shew that they have a less amount of pasture than they had; the utmost that can be proved is, that the surface would be somewhat lower than it was before, but the surface-area still remains the same.

The holder of a customary tenement or copyhold has a grant of the whole property, and the lord cannot derogate from his own grant. He cannot enter upon a copyhold tenement and take the minerals. He cannot have such a general right except by custom: *Bourne* v. *Taylor* (3). The grant of the copyhold tenement passes the whole close to the centre of the earth, but this is not so in the case of a commoner. *Bateson* v. *Green* was not a case of copyhold but of common, and *Hilton* v. *Lord Granville* (4) does not affect the lord's right in the waste. In that case the question arose where houses were built on the copyhold property. Here it is in the nature of a waste that it should not be built upon, therefore the two cases are very different. Letting down the surface might

(1) 5 T. R. 411.
(2) 7 B. & C. 346.
(3) 10 East, 189.
(4) 5 Q. B. 701.

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endanger houses, but that could not happen on a waste. In *Rogers* v. *Taylor* (1), a case under the *Prescription Act*, the land had been part of the waste, and was severed by inclosure, and it was held that the lord had a right to quarry, though in case depending upon grant it would not have been so. *Marquis of Salisbury* v. *Gladstone* (2), and *Hanmer* v. *Chance* (3), were cases turning upon the same principle.

In this case, and for this purpose, the Act of Parliament has left us in possession of all the rights we had before. The Legislature has said that we are to have liberty to do all acts for getting the minerals in as complete a manner as if the land had remained open and uninclosed. The Plaintiff must shew that the Duke is doing what would have been an injury to the commoners before the inclosure. If any one allottee should suffer, and be unable to get sufficient pasture by reason of the damage done by the lord, then it is provided by the Act that he shall have compensation, which would not have been the case before the Act. The lord has the same right he had before, but, by the Act, he must make compensation for any injury done.

The right we now contend for is supported by the cases under Inclosure Acts which have already been decided, such as *Earl of Rosse* v. *Wainman* (4), *Rowbotham* v. *Wilson* (5). In the latter case Lord *Wensleydale* held that the right to dig for minerals necessarily involved a right to injure the surface. If the minerals cannot be obtained without causing a subsidence, then subsidence is allowable. The case of *Roberts* v. *Haines* (6) was not so strong as this, and there was no reservation in that case of ancient rights; and *Blackett* v. *Bradley* (7) was treated as a repetition of *Hilton* v. *Lord Granville* (8). But the former case was one of common and the latter related to a copyhold. In *Blackett* v. *Bradley* the clause only reserved the usual liberties, and there was no question of subsidence.

Cases have also occurred under the Railways and the Lands Clauses Acts. By the 77th and 78th sections of the former Act (8 Vict. c. 20) mines are reserved to the landowner. If the owner wishes

(1) 1 H. & N. 706.
(2) 9 H. L. C. 692.
(3) 12 L T. (N.S.) 163.
(4) 14 M. & W. 859.
(5) 8 H. L. C. 348.
(6) 6 E. & B. 643.
(7) 1 B. & S. 940.
(8) 5 Q. B. 701.

to work the mines he must give notice to the company, who may purchase them or pay compensation. If not, then the owner may work the mines so long as they are not worked in an improper way. In *Fletcher* v. *Great Western Railway Company* (1) the owner of the minerals was held to be entitled to compensation under the circumstances. The position of the landowner under the railway Acts is not so good as the Defendants', because here there is an express reservation.

As regards the evidence in this case upon the custom, it is said that some of the clauses of the Act refer to another manor, but we shew that the place in question is part of one entire district or manor, and we may give evidence of the custom on any part of the manor, as in *Tyrwhitt* v. *Wynne* (2). There may be a manor within a manor, or a district may be a sub-denomination of a larger manor, but it is necessary to attend to the evidence as to the general manor to shew custom in a sub-manor: *Cruise's* Digest (3). Where there are two sub-manors of one principal manor, it is more necessary to attend to the evidence of general custom in the whole manor. But you want no custom to shew the lord's right to work the mines. The only question is as to the sufficiency of the common which is left. If the working cannot be done without injury to the surface, the lord may, nevertheless, work apart from any custom. We shew that it was the custom of the lord to work the minerals of the copyholders irrespective of the consequences to the surface, and therefore he might, *à fortiori*, work them upon the waste. We have also proof that in other workings there has been a subsidence caused. The custom for which we contend is clearly good, and is supported by authority. The only case which could be cited in opposition is that of *Hilton* v. *Lord Granville* (4), and that is not now of much authority. The witnesses say there is no way of working these mines without causing a subsidence, in consequence of the nature of the strata and of the soil; and though it is suggested that there might be some other method, it is most improbable, and it certainly would have been adopted long before this. On the contrary, it is shewn that the mode of working now adopted has always been the

(1) 4 H. & N. 242.
(2) 2 B. & A. 554.
(3) Vol. i. p. 266.
(4) 5 Q. B. 701.

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mode throughout the district. If this were not the best method of working, it would not have been in practice for so long a time.

Mr. *Glasse*, Q.C., Mr. *Hardy*, Q.C., and Mr. *Field*, for *Miles Kennedy*, the lessee of the Duke of *Buccleuch* :—

At the time the Plaintiff purchased his land Mr. *Kennedy* had already opened the mines. The Plaintiff purchased with an open shaft on the ground, therefore he had full notice of what was going on, and must have known the effect of such workings. It was decided in *Darvill* v. *Roper* (1), and *Bell* v. *Wilson* (2), that quarries meant only surface quarrying, and if the lord has a right to quarry over the whole surface, that would destroy it much more than digging mines, which would only cause a subsidence of the surface.

The *Attorney-General*, in reply :—

The argument of the Defendants' counsel proceeds on the assumption that the question is one between lord and commoner, and they contend that the only limit to the lord's right of working the mines is that he must leave sufficient common. But the *Inclosure Act* totally altered the position of the parties, and put an end to all manorial rights, and the question now is between the owner by express grant of the surface in fee simple, freed from all manorial rights, and the lord of the manor as the owner of the mines. All the cases, therefore, between lord and commoner can have no bearing on the present case. The 43rd section, under which the Defendants, in fact, claim, does not confer on them any right to let down the surface, and the compensation clause on which they rely can only apply to the rights reserved by that section.

The Defendants further relied on the right of quarrying; but quarries stand on a totally different footing from mines, as they are worked from the surface, and are of a much smaller extent than mines; and, according to the Defendants' own argument, the lord would not be allowed by quarrying to destroy the whole surface, which the Defendants now claim the right to do.

In the absence of express stipulation to the contrary, the right to

(1) 3 Drew. 294. (2) Law Rep. 1 Ch. 303.

surface support is absolute and indefeasible, and it avails the mine owner nothing to say that he is working in the usual way and without negligence, or to prove any custom to the contrary. *Rowbotham* v. *Wilson* (1) shews that an express stipulation may destroy the right to surface support; all the other cases shew that without such reservation such right prevails.

The railway and canal cases stand upon a totally different footing from the present case. In all those cases where the owner of the mines could let down the surface, such right depended on an implied stipulation. The companies, under their Acts, take the land compulsorily, and against the will of the proprietor; such companies may purchase the minerals if they think fit; but if they do not, and the owner works them, he is entitled to his original right to let down the surface.

If any custom reaches the Plaintiff's inclosure, it is bad if it would destroy such inclosure; and it is equally bad although it may be impossible to get at the minerals without letting down the surface.

Assuming, therefore, the evidence as to impossibility of working without letting down the surface, the Plaintiff has an absolute right to support; and if so, the only way in which the Defendant can get at the minerals is under the 43rd section.

Moreover, there is no custom shewn as to working the mines under the manor of *Plain Furness*, or, if there be any such custom, it does not extend to letting down the surface; and further, the evidence shews that it is not impossible to work the mines without letting down the surface.

Bastard v. *Smith* (2) shews that overwhelming evidence is necessary to prove a custom which would defeat another person's rights, and there is no such evidence here.

Mr. *Glasse*:—

The case of *Bastard* v. *Smith*, cited in reply, was as to the right to divert water, and had nothing to do with the right of surface. [He also referred to *Whitgreave* v. *Whitgreave* (3), and *Coventry* v. *Coventry* (4), on the word "already" in the 43rd section, and to

(1) 8 H. L. C. 348.
(2) 2 M. & Rob. 129.
(3) 33 Beav. 532.
(4) 32 Ibid. 612.

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Place v. *Jackson* (1) as an authority to the effect that an Inclosure Act leaves the rights of the lord and commoners as they were before it passed.]

May 8. SIR RICHARD MALINS, V.C.:—

The Plaintiff, for the purposes of the present argument, being bound by my former decision, admits the right of the Defendant to work the mines under his land; but he now contends that he must not let down the surface in so doing.

The nature of the ore to be worked under these lands is peculiar. It is not like coal, which, though it lies in veins of various thickness (in one district six feet, in another three, or less, in another thirty feet, as in *Staffordshire*), is nevertheless found in regular veins, so that the person working can calculate, and by leaving a certain quantity of coal as pillars, has the power of supporting the surface. But the mines in question in this case are of the hæmatite or red ore, which lies in irregular beds.

[His Honour, after referring to the evidence, continued:—] Nothing can be more diametrically opposed than the evidence on the two sides as to the effect of working these mines, but, according to the view I take of this case, it is not necessary for me to decide on this conflict of evidence, though I am bound to say that I think the result of it is to establish the proposition of the Defendant, that these mines cannot be effectually worked without causing a subsidence of the surface, and that the result of granting the injunction asked by the Plaintiff will be to stop the working of the iron ore in this district unless with the consent of the owners of the surface; and I will assume the establishment of these facts as the basis of my judgment.

Taking it, then, as established that the mines of the Defendant cannot be worked without destroying the surface belonging to the Plaintiff, has the Defendant the right so to work? In other words, if the rights of the Plaintiff and Defendant cannot co-exist, which must give way to the other? Upon principle, if there were no authority, I should say that the surface, having at all times been enjoyed

(1) 4 D. & R. 318.

by man, must be protected at the expense of the mines, which have never yet been so enjoyed; that is, the mines, in my opinion, must be regarded as a tenement subservient to the surface. With regard to the Defendant's rights, it was argued that they must be considered to stand now as they stood before the *Inclosure Act* of 1821. It is clear that, before the Act, the Defendant's predecessor in title was entitled to the soil of the land in question, and of all the other lands which were inclosed under it, and to all the mines under them. The title is recited by the Act, and is unquestionable and unquestioned. Could he then at that time have worked so as to let down the surface? The authorities cited by Sir *Roundell Palmer* for the Defendant shew that he could not at that time have mined so as not to leave a sufficiency of common for the commoners, and that is the extent of his right according to the evidence of the Defendant himself. [His Honour here referred to the evidence of some of the Defendant's witnesses.]

This view of the rights of the parties is supported by the authorities cited by Sir *Roundell Palmer*. In *Cruise's* Digest (1) it is said, "With respect to the several rights of the lord or owner of the soil and the commoners, it has been long settled that the lord of the manor, or other owner of the soil, in which there is a right of common, has the freehold and inheritance in him, and may exercise every act of ownership not destructive of the commoner's rights. Therefore if a person claims by prescription any manner of common in another's land, and that the owner shall be excluded from having pasture, estovers, or the like therein, this is a prescription against law, as contrary to the nature of common; it being implied in the first grant that the owner of the soil should take his reasonable profit there. But a person may prescribe or allege a custom to have and enjoy *solam vesturam* from such a day to such a day, whereby the owner of the soil shall be excluded from pasturing his cattle there at that time."

In *Arlett* v. *Ellis* (2), which was also cited by Sir *Roundell Palmer*, the question arose how far the lord of the manor could inclose or approve. He had granted the exclusive right

(1) Vol. iii. p. 73, *pl.* 47. (2) 7 B. & C. 346.

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of the soil to the Plaintiff, and the question was, therefore, what were the limits of his authority. That case was very fully considered, and I refer to the judgment of Mr. Justice *Bayley* (1), in which he says: "Then as to the right of the lord to inclose the land in question, and to grant a perfect title to the Plaintiff, it was insisted, first, that the lord had an unlimited and unrestricted right (founded upon a custom in this particular manor) to abridge the rights of the commoners, and to confer in severalty upon any person, from time to time, such portions of the waste as he in his discretion should think fit; it seems to me that such a right is utterly inconsistent with an existing right of common, for the lord might by degrees inclose the whole of the waste, and so annihilate the right of the commoners. *Badger* v. *Ford* (2) is an authority upon that point; but had there been no authority, I should have thought that, wherever it is once established that a right of common has existed from time immemorial, such a privilege or custom in the lord cannot by law be supported, because it would be in destruction of that right of common. All the authorities which have been cited in support of such right are distinguishable from the present case. The right claimed is to sever and take away permanently from the common a beneficial part of it, so as to deprive the commoner of any power or right over that part." The learned Judge then goes on to comment on *Bateson* v. *Green* (3), which has been much relied upon by the Defendant's counsel in the present case. "In that case," Mr. Justice *Bayley* says (4), "there had been from time immemorial an usage for the lord to dig clay upon the waste, and that was held to be evidence to shew that when he granted out the right of common to the commoners, he reserved to himself the right of digging clay. The extent to which it had been carried in that case did not appear to be unreasonable. Lord *Kenyon*, in delivering judgment, intimated that there was no evidence to shew that the right had been more exercised of late years than formerly. Now, the lord by digging for clay takes from the land a product of a particular species, but the land afterwards remains capable of yielding food fit for the feeding of cattle. Indeed it frequently

(1) 7 B. & C. 365.
(2) 3 B. & A. 153.
(3) 5 T. R. 411.
(4) 7 B. & C. 365.

happens that land, besides the support which it yields for the food of man or of cattle, has within it some valuable product, as marl or limestone, which it is desirable for the owner of the waste to obtain, and it is not unreasonable that the lord of a manor, when he grants rights on that land, should reserve to himself the right of taking such marl or limestone. But when he takes them he does not permanently deprive the commoners of that benefit which they are entitled to derive from the surface of that part of the land from which the marl or limestone is so taken. A case of that sort is distinguishable from the present, because the lord still leaves for the benefit of the commoner something capable of yielding food for his cattle. The user of the privilege by the lord from time to time is evidence to shew that he reserved that right to himself, and the nature of the substance which is taken from the earth shews that such reservation was not unreasonable. The exercise of such a right will no doubt interfere with the privilege of the commoners during the time the produce is taken from the earth and until the surface reproduces pasturage. But the distinction between that case and the present is, that here the commoner is wholly and permanently deprived of the benefit of a quantity of land, whereas in that case the land was only taken away for a certain period." Then he comments upon a case of *Clarkson* v. *Woodhouse*, which is one of the cases reported in a note to the case of *Bateson* v. *Green* (1). Mr. Justice *Bayley* again says (2), "The lord has a right to approve, not as lord, but as owner of the soil. *Glover* v. *Lane* (3) shews that the owner of the soil, whether lord or not, may make such an approvement. It seems to me that the lord's right is this: he may approve provided he leave sufficiency of common of pasturage for all the cattle which are entitled to feed upon it. The common may originally have been destined for a definite number of cattle, or for all cattle levant and couchant upon certain lands; many of those rights may be extinguished, or the common itself may produce so much more herbage that a smaller portion of that common may be sufficient for depasturing the cattle of the persons entitled than when it was originally destined to that purpose. Now, whenever that is the case, I think that the lord has a right to inclose; but, in order

(1) 5 T. R. 411. (2) 7 B. & C. 369. (3) 3 T. R. 445.

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to justify making the inclosure, it is incumbent upon him" (that is, the burthen of proof rests upon him) "or his grantee, when the right to inclose is questioned, to shew that there is sufficiency of common left. In all the cases in which the right of the lord to inclose has been stated in the record, there has been an allegation that he left sufficient common for the commoners; that was so in *Glover* v. *Lane* (1) and in *Grant* v. *Gunner* (2). The commoner has a certain right over the whole of the waste, and when the lord abridges that right he ought to shew that he has done that which the law requires him to do before he abridges the right of the commoner. And, therefore, I am of opinion that in this case it ought to have been submitted to the jury whether there was or was not, at the time when the lord made the grant of the *locus in quo*, a sufficiency of common left for all the persons having rights of common upon the waste in question." In the same case Mr. Justice *Holroyd* expresses himself to the same effect. He says (3), "With respect to the right of the lord, I cannot accede to the doctrine that he can have an unlimited right by custom to inclose common. I think that such a custom would be void, because it would go to the destruction of the right of the commoners altogether. It would be inconsistent with that right and with the grant which, from the usage and custom, must be presumed to have been made to the tenants or persons entitled to the right of common. The cases of *Bateson* v. *Green* (4), *Clarkson* v. *Woodhouse* (5), and *Folkard* v. *Hemmett* (6), are distinguishable from the present for the reasons given by my brother *Bayley*." And he further says (7), "The question considered by the Court was whether the right of the lord to dig for clay was subservient to that of the commoners or not, and the Court decided that the custom shewed the right of the commoner to be subservient to that of the lord." That was upon the particular evidence. Mr. Justice *Littledale* says (8), "It seems to me that a general custom for the lord of the manor to take in parts of the waste cannot be supported, for the reasons already given by my brother *Bayley*. If such a custom were valid, the lord might by degrees

(1) 3 T. R. 445.
(2) 1 Taunt. 435.
(3) 7 B. & C. 372.
(4) 5 T. R. 411.
(5) 5 T. R. 412 n.
(6) 5 Ibid. 417.
(7) 7 B. & C. 373.
(8) Ibid. 375.

take away the whole of the rights of the commoners, but I see no objection to a custom for the lord to make inclosures from time to time, leaving a sufficiency of common;" and he further says (1), "It seems to me that it lies on the lord, or the persons claiming under him, to shew that a sufficiency of common is left. Where the lord approves under the *Statute of Merton*, he shews a sufficiency of common left."

The observations of the learned Judges, just quoted, dispose of the case of *Bateson* v. *Green* (2), which was so much relied upon by the counsel for the Defendants, for they shew that it depended upon a particular right as established by the user in that particular manor; and not on any general right of the lord of the manor as against the commoners. The case of *Filewood* v. *Palmer* (3) is, in truth, in accordance with this, as the whole question turned upon the fact of a sufficiency of common being left for the commoners.

It is plain, therefore, that before the *Inclosure Act* the lord could not have mined in the waste lands without shewing that he had left a sufficiency of common for the commoners, and that he had no such unlimited right as has been contended for in his behalf. But even this state of things was completely altered by the *Inclosure Act*, for the 24th section directs that one-sixteenth part of the wastes shall be allotted to the lord or lady of the manor, as a compensation for his or her right and interest in the soil of the wastes; and the 29th section enacts that all allotments to be made to the customary tenants of the manor shall be and become estates of freehold in the several and respective parties to or for whom the same shall be set out and allotted, to be held of the manor in free and common socage. The result is, therefore, that by the inclosure the lord is excluded from all right whatever to the surface, and that the Defendant would be a trespasser if he put his foot on the Plaintiff's land, without his consent, for any other purpose than for the working of the mines, and the right reserved to him by the 43rd section. The Act has, therefore, put the Plaintiff and the Defendant in the ordinary position of the one being the owner of the surface, and the other of the mines and

(1) 7 B. & C. 376.
(2) 5 T. R. 411.
(3) Mosely, 169.

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minerals under it, with the most extensive and complete right over the surface for the purpose of working the mines.

Under these circumstances, is the lord entitled to mine so as to let down or destroy the surface? This question has been much agitated of late years, under different circumstances, no doubt, as to the nature of the mines in question; and it will be necessary for me to advert to the authorities.

In *Harris* v. *Ryding* (1), which is a case which occurred in 1839, and may be considered as the first of the series of authorities, the owner in fee simple of the land granted the surface, reserving to himself all the mines—I emphatically say all—the mines and minerals under the surface. The grantee of the minerals proceeded to work, and in the course of working let down the surface. That led to an action for negligence in working, and that raised the question which is raised in this case,—whether, under those circumstances, all the mines and minerals being reserved to the grantor, the person claiming under the grantor had a right so to work that he could, according to the express words of the grant, take all the minerals; for it was agreed on all hands that if he took all the minerals the necessary effect must be to let down the surface. Therefore the question arose whether it meant all, or only so much as could be worked without letting down the surface. Several Judges gave judgments in that case, but Lord *Abinger*, the Chief Baron, is very express on the subject. I will read only the more important part of that case, which has been subsequently followed by the other authorities. The present Lord *Wensleydale*, then Baron *Parke*, thus expresses himself (2):—"What, then, is the meaning and intention of the parties here? It is clearly the meaning and intention of the grantor that the surface shall be fully and beneficially held and enjoyed by the grantee, he reserving to himself all the mines and veins of coal and iron ore below. By reasonable intendment, therefore, the grantor can be entitled, under the reservation, only to so much of the mines below as is consistent with the enjoyment of the surface, according to the true intent of the parties to the deed; that is, he only reserves to himself so much of the mines and minerals as could be got, leaving a reasonable support to the surface. That is the true construction of this deed

(1) 5 M. & W. 60. (2) 5 M. & W. 70.

in order to make it operate according to the intention of the parties. It never could have been in their contemplation that, by virtue of this reservation of the mines, the grantor should be entitled to take the whole of the coal, and let down the surface, or injure the enjoyment of it; it is very like the case of the grant of an upper room in a house, with the reservation by the grantor of a lower room, he undertaking not to do anything which will derogate from the right to occupy the upper room, and if he were to remove the supports of the upper room, he would be liable in an action of covenant, for the grantor is not entitled to defeat his own act by taking away the under-pinnings from the upper room. So, in this case, he would be acting in derogation of his grant if he were to take away the whole of the coal below, he having granted the use of the surface to the grantee. If that is the true construction of the reservation and power, the Defendant ought to have stated in his plea that he took the coal he did take, leaving a reasonable support for the surface in the state it was in at the time of the grant." And then, following up that principle, the decision of the Court was, that the grantee of the mines was bound to leave a sufficient portion of them to support the surface, and that by a grant of all the mines only so much passed, or it gave the authority to take so much only, as was consistent with leaving a sufficient support to the surface; in other words, that the owner of the surface rights was not in any way to be interfered with by the surface being let down.

The next authority, which was so much commented upon on both sides during the argument, is *Humphries* v. *Brogden* (1), and that was an action by the occupier of the surface of the land against the owner of the mines for negligently working the mines without leaving a sufficient support for the surface. Now this case occurred in 1850—that is, eleven years after the decision in *Harris* v. *Ryding* (2). The circumstances are precisely the same in principle, and this case, therefore, called for a formal reconsideration of the decision in *Harris* v. *Ryding*. In giving judgment, Lord *Campbell* lays down the law thus (3):—"This right to lateral support from adjoining soil is not like the support of one building upon another,

(1) 12 Q. B. 739. (2) 5 M. & W. 60.
(3) 12 Q. B. 744.

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supposed to be gained by grant, but is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed as much as after the expiration of twenty years or any longer period. *Pari ratione*, where there are separate freeholds from the surface of the land, and the minerals belonging to different owners, we are of opinion that the owner of the surface, while unincumbered by buildings, and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support for the surface is left; but if the surface subsides, and is injured by the removal of these strata, although, on the supposition that the surface and the minerals belong to the same owner, the operation may not have been conducted negligently, nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which it is entitled from the adjoining surface close, it cannot be securely enjoyed as property; and under certain circumstances, as where the mineral strata approach the surface, and are of great thickness, it might be entirely destroyed;" and " something has been said of a right to a reasonable support for the surface, but we cannot measure out degrees to which the right may extend, and the only reasonable support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level." And upon those principles it was decided in that case, following *Harris* v. *Ryding* (1), that however skilfully the miner worked his mines, if the result of the mining was to let down the surface, he was liable to an action for doing so.

That was followed by *Smart* v. *Morton* (2), which occurred in 1855, five years later, and in which the same point was decided. The rights and obligations of the owner of the surface and the owner of the mines are stated in the judgment of Lord *Campbell*. He says (3):—" The rights and obligations of parties where the

(1) 5 M. & W. 60. (2) 5 E. & B. 30. (3) 5 E. & B. 45.

surface of land belongs to one owner, and the minerals under it belong to another, appear to be well settled by the two cases of *Harris* v. *Ryding* (1) and *Humphries* v. *Brogden* (2). *Primâ facie*, the owner of the surface is entitled to support from the subjacent strata, and if the owner of the minerals works them, it is his duty to leave sufficient support for the surface in its natural state. But the *primâ facie* rights and obligations of the owner of the surface and of the minerals may be varied by the production of title deeds or by other evidence." That, also, following the other cases, decided that the owner of the minerals was bound so to work them as not to let down the surface.

The same principle was acted upon in the House of Lords in the case of the *Caledonian Railway Company* v. *Sprot* (3), which was the case in which the land had been granted to a railway company for the purpose of constructing their works; and Lord *Cranworth*, in giving his judgment, after referring to the cases I have just cited, and commenting upon the decision of the Scotch Courts, which was reversed, says (4):—"Those very able Judges seem to me to have overlooked, or not to have given due weight to, the effect of conveyance of 1834 (that is, the conveyance to the company). If I am right, which I cannot doubt, in saying that by his conveyance Mr. *Sprot* conveyed to the company, not only the land to be covered by the railway, but also, by implication, the right to all necessary support, then he cannot, by reason of his having reserved the mines, derogate from his own conveyance by removing that support. In reserving mines he must be understood to have reserved them so far only as he could work them consistently with the grant he had made to the company. The learned Judges of the Court below seem to me to have overlooked this principle, and, in so doing, to have been led into an erroneous conclusion. All, therefore, that I can do, is to move your Lordships to reverse the interlocutors of the Court of Session, and to affirm that of the Lord Ordinary. I may add that the subject of the right of the owners of the surface to adequate subjacent and adjacent support, has, on several recent occasions, been discussed in the English Courts. The principles which there govern the decisions, were not derived

(1) 5 M. & W. 60.
(2) 12 Q. B. 739.
(3) 2 Macq. 449.
(4) Ibid. 461.

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from any peculiarities of the English law, but rested on grounds common to the Scotch, and, I believe, to every other system of jurisprudence. They were considered in the case of *Harris* v. *Ryding* (1), and very fully developed in the judgment of the Court of Queen's Bench, delivered by Lord *Campbell* in the case of *Humphries* v. *Brogden* (2)." Therefore, there is the House of Lords completely adopting those decisions, the authority of which it is impossible to overstate.

The next case I shall refer to is particularly important, because, like the present, it turned only on the relative rights of the holder of the surface and the holder of the minerals under the *Inclosure Act*. *Roberts* v. *Haines* (3) was in its circumstances precisely the same as the present. It was a case in which the right of taking minerals was reserved to the lord, and precisely as it is here, the surface being in one person under the *Inclosure Act*, and the minerals reserved to the lord in the other. Therefore, although it was under an Inclosure Act, the decision was precisely the same, and in the judgment Lord *Campbell* expresses himself thus (4): "Under the *Inclosure Act*, after the allotment has been made, the allottee of the surface, although the minerals are reserved, has all that the owner of the surface has when the surface and the minerals are under distinct ownerships. It lies on the Defendant, who has the minerals, to shew that under the Act some right is conferred upon him which the common law did not give. Before the *Inclosure Act* the land down to the centre of the earth belonged to the lord; he agrees to the Act, and by that he places the allottees of the surface of the inclosed waste in the same position as if it had been ancient inclosed land, and the lord had alienated the surface, reserving the minerals. In such a case the owner of the surface would in general have a right to the support of the strata below, and it would lie on the mine owner to shew a special right derogating from this. That being so, according to *Humphries* v. *Brogden*, a decision which binds us until it is corrected by a Court of Error, the owner of the surface has a right to support from the subjacent strata; and if the owner of those strata, working ever so carefully, and conformably to the customary mode, causes the sur-

(1) 5 M. & W. 60.
(2) 12 Q. B. 739.
(3) 6 E. & B. 643.
(4) Ibid. 652.

face to subside, he is liable to an action at the suit of the owner of the surface. Then, what are the special powers conferred by the *Inclosure Act?*" He then comments on those powers, and shews that powers like those in the present Act do not go beyond those of a grantor who, in granting the surface, reserves to himself all right of working the minerals. That case went by Error to the Exchequer Chamber, and the decision was unanimously confirmed (1); the Lord Chief Justice saying (2): "We are all of opinion that the decision of the Court of Queen's Bench was right. The question arises on the second issue, which traverses the right to support. Now, looking to the provisions of the private Act, it appears that the effect is to place the parties in the same position as though the lord, originally owner in fee of the whole soil, had conveyed the surface to the allottees. I concur with the Queen's Bench in thinking that, under such circumstances, the owners of the surface have a right to support, which is the main question in this case. Our attention has been called, very properly, to the clauses at pages 56 and 57 of the Act. The clause at page 56 applies to the case of the lord entering on the surface" (a clause very similar to the 43rd section in the present Act), "and working there, which is not the case now before us. The clause on page 57 contains a prohibition against working the mines within the perpendicular distance of forty yards from the foundation of any houses." That case, therefore, decides a most important point—that whether the ownership of the mines is under an express grant by deed from the owner of the land, or whether it is by virtue of a reservation under an Inclosure Act, the result is precisely the same.

The next case which it is necessary to refer to is *Dugdale* v. *Robertson* (3), before Sir *W. P. Wood* in 1857, a case in which, fully acknowledging and following the decisions at law, the Vice-Chancellor granted an injunction to prevent an infraction of the rights of the owner of the surface. *Stroyan* v. *Knowles* (4), a decision of the Court of Exchequer in 1861, is a case which merely follows the rule established by the other cases; and so also have the cases of *Richards* v. *Harper* (5) and *Proud* v. *Bates* (6).

(1) 7 E. & B. 625. 3 Jur. N.S. 886
(2) Ibid. 626. 3 Jur. N.S. 886
(3) 3 K. & J. 695. 3 Jur. N.S. 687
(4) 6 H. & N. 454.
(5) Law Rep. 1 Ex. 199. 12 Jur. N.S. 770
(6) 34 L. J. (Ch.) 406. 11 Jur. N.S. 441

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The authorities having thus concurred in establishing the right of the owner of the surface to have it supported by adjacent and subjacent minerals, great reliance was placed by the Defendant's counsel on the decision of the House of Lords in *Rowbotham* v. *Wilson* (1). But that was a case in which the owner of the surface had expressly given the owner of the mines the right of breaking down the surface in any way that he might find convenient. It was very much pressed upon me that, this being a decision of the House of Lords that the owner of the mines might let down the surface, it would be my duty to follow it. But it is impossible to read the judgment of Lord *Wensleydale* in that case without seeing that his decision turned entirely upon the terms of the award, and all the observations made by him, which were so much relied upon by the Defendant's counsel, must be referred to the circumstances of the case upon which he was adjudicating, and there is not a word in his judgment, or in that of Lord *Chelmsford*, shewing an intention to impugn the rules laid down in *Harris* v. *Ryding* (2), *Humphries* v. *Brogden* (3), and the other cases which have followed them. That case, therefore, turned wholly on the particular form of the grant, and does not proceed on any general principles which are applicable to this case.

The Defendant then relies upon a custom in the district of *Furness*, including the manor of *Plain Furness*, in which these lands are situate, entitling the owner of the mines to let down the surface whenever it is necessary to do so in the course of his operations. But I am of opinion, in the first place, that the evidence wholly fails to establish such a custom, and even if it had established it, I should, in the second place, have been bound by the decision of the Court of Queen's Bench in the case of *Hilton* v. *Lord Granville* (4) to hold that such a custom was bad and wholly void. In that case Lord *Denman* says (5), "The greatest reliance, however, was placed on some decisions in which a custom derogatory to the lord's oral grant has been holden valid. *Bateson* v. *Green* (6) is the strongest of these cases, where the lord of a manor defended himself successfully against a commoner whose extent of

(1) 8 H. L. C. 348, 6 Jur. N.S. 965.
(2) 5 M. & W. 60.
(3) 12 Q. B. 739.
(4) 5 Q. B. 701.
(5) Ibid. 729.
(6) 5 T. R. 411.

common he had curtailed by taking clay on proof that the lord had constantly done so. The language of Lord *Kenyon* is certainly large, though considered by *Bayley*, J., in *Arlett* v. *Ellis* (1), to be subject to some restriction. If, indeed, it must be taken to import that a lord, after granting rights of common, may help himself to any portion of the common land to the exclusion of his grantees, such a doctrine is incompatible with many other cases, and cannot be supported in principle. The two decisions in the notes to *Bateson* v. *Green* (2) are much more cautiously worded, and in that of *Folkard* v. *Hemmett* (3), Lord Chief Justice *De Grey* expressed himself conformably to what we consider the true legal principle. 'The Defendants justify under the usage, I will not call it a custom, because I look on it as a reserved right of the lord,' and assuredly whatever the lord can reasonably be supposed to have reserved out of his grant, the usage may adequately prove that he did reserve. But a claim destructive of the subject matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie"—as I shall shew, no doubt, this particular passage was reversed afterwards by the House of Lords,—" reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument." Therefore this is a solemn decision of the Court of Queen's Bench, that the custom for the owner of the minerals so to mine as to let down the surface to the damage of the buildings was repugnant and absurd, and wholly void.

Now, it was said by Sir *Roundell Palmer*, in his argument, that *Hilton* v. *Granville* (4) was "a decision on its last legs;" I think that was his expression. But I cannot so regard it, for it being a decision in 1845, the same point came before the same Court in 1862, in the case of *Blackett* v. *Bradley* (5), and so far from this decision in *Hilton* v. *Lord Granville* being on its "last legs," I find that the Lord Chief Justice *Cockburn*, in delivering the judg-

(1) 7 B. & C. 346.
(2) 5 T. R. 411.
(3) 5 T. R. 417.
(4) 5 Q. B. 701.
(5) 1 B. & S. 940.

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ment of the Court, says (1): "In this case, which was argued before my brothers *Wightman*, and *Blackburn*, and myself, on the argument on the demurrer to the plea, it was admitted that if *Hilton* v. *Lord Granville* (2) was to be considered as law, the present case was within the decision in that case, and, so far as this Court was concerned, must be governed by it. But it was insisted on the part of the Defendants that the case of *Hilton* v. *Lord Granville* had been so much impugned and shaken by subsequent cases, that it must be considered as virtually overruled, at all events sufficiently so to call upon the Court to review the decision in that case, and upon the arguments urged against its validity now to overrule it. There can be no doubt that, to some extent, the authority of *Hilton* v. *Lord Granville* has been shaken"—that "to some extent" is what I shall afterwards refer to,—"inasmuch as a position, assumed in the reasoning of the Court as one of the grounds of its decision, has since been distinctly overruled in the House of Lords in the case of *Rowbotham* v. *Wilson* (3), in which the question presented itself for adjudication; and it cannot be denied that the decision itself has not met with the universal approval of the profession, and that it may be desirable that the validity of that decision should be brought under the consideration of a Court of Error. At the same time it is equally clear that though the reasoning of this Court in *Hilton* v. *Lord Granville* has been impugned, the decision in that case has not been overruled. And the judgment having been a considered judgment of the Court, and standing unreversed, we do not feel ourselves at liberty to consider ourselves as otherwise than bound by it. We must, therefore, but without expressing any opinion one way or the other as to the propriety of the decision in question, give judgment on the third plea for the Plaintiff, leaving the Defendants to take the case into Error if they shall be so advised." I say that although it is true that the dictum of Lord *Denman* (4), that "even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd," was overruled by the House of Lords in *Rowbotham* v. *Wilson*, it is remarkable that neither of the noble

(1) 1 B. & S. 954, 955; 31 L. J. Q. B. 290 (3) 8 H. L. C. 348; 30 L. J. Q. B. 265
(2) 5 Q. B. 701. (4) 5 Q. B. 730.

Lords who gave judgment said a word impugning the decisions in the case upon the general point. It was rather urged upon me that Lord *Wensleydale*, in the observations which he there made, acted in contravention of the decisions of *Harris* v. *Ryding* (1) and *Humphries* v. *Brogden* (2), but Lord *Wensleydale* does not say one word shewing an intention to go against the authorities. On the contrary, he recognises them, and therefore, although that one position is rejected, I may consider that, with that single exception, the House of Lords has adopted the decision in *Hilton* v. *Lord Granville* (3), and that, at all events, it is a decision which is binding upon me. I consider, therefore, that the authority of the case is unshaken, and binds me to decide against the Defendants upon the alleged custom.

Several other cases were cited in the arguments on both sides, all of which I have read and considered, but as they do not decide anything immediately applicable to the points in contest in the case, I do not think it necessary to notice them more particularly. I may, however, observe that *Fletcher* v. *Great Western Railway Company* (4) and *Great Western Railway Company* v. *Bennett* (5), recently before the House of Lords, turn on the construction of the Railway Acts, and have consequently no application to this case.

It was contended in the argument for the Defendant, upon the circumstance of the quarries being reserved to the lord by the 43rd section, the quarries being necessarily on the surface, that if the lord had a right to go on the surface to take the quarries, such quarries might pervade the whole surface, and therefore the existence of that right shewed that, if thought necessary, the surface might be disturbed.

There was, undoubtedly, considerable force in that argument, and it was the strongest point, I think, that was urged on me, shewing the right of the lord to interfere with the surface belonging to Mr. *Wakefield*.

But there is this remarkable distinction between letting down the surface by mining operations—that the mining operations may go under the whole of the land, whereas a quarry is usually of very

(1) 5 M. & W. 60.
(2) 12 Q. B. 739.
(3) 5 Q. B. 701.
(4) 4 H. & N. 242.
(5) Law Rep. 2 H. L. 27.

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limited area. I cannot, therefore, consider the circumstance of quarries being reserved as entitling the Duke of *Buccleuch*, if necessary, by mining operations, to let down the whole surface of this land, because the evidence distinctly proves that if the surface is ever let down it is to be for ever destroyed, that it will be let down to the extent of thirty or forty feet, and though some of the witnesses have attempted to shew that the surface after it has been let down may be restored for agricultural purposes, the thickness of the veins in this case, and the extent of letting down the surface, is such that I am satisfied the surface, when once let down, is for ever destroyed; and the question, therefore, is, whether the surface is, by the mining operations, to be destroyed?

Principle and authority being then, as I conceive, in favour of the Plaintiff, I am bound to declare, as I do, that the Defendant and his lessees are not entitled, in their mining operations, to work in such a manner as to cause a subsidence of the surface. There must be a perpetual injunction accordingly. I am fully alive to the fact that the result of my judgment is to put the owner of the mines at the mercy of the owner of the surface, but in most instances their common interest would lead to an arrangement, and I assume the contrary to be the case here, on account only of the surface being of some peculiar and extraordinary value to Mr. *Wakefield*. And I might apply the language of Lord *Campbell* in *Humphries* v. *Brogden* (1), where, adverting to the difficulties introduced by the restrictive rights of the owner of the mines, he says: "Greater inconvenience cannot arise from this rule in any case than that which may be experienced where the surface belongs to one owner and the minerals to another, who cannot take any portion of them without the consent of the owner of the surface. In such cases a hope of reciprocal advantage will bring about a compromise advantageous both to themselves and to the public."

The result of my former and present judgment, therefore, is, that the Plaintiff fails, so far as he seeks a declaration that he is entitled to the minerals, and succeeds as to the relief sought against working the mines so as to cause a subsidence of the surface.

The bill must, therefore, be dismissed with costs as to the first

(1) 12 Q. B. 745.

point, and the decree must be in favour of the Plaintiff, with costs, on the second point.

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Solicitors for the Plaintiff: Messrs. *Gray, Johnston, & Mounsey.*
Solicitors for the Defendant: Messrs. *Nicholl, Burnett, & Newman;* Messrs. *Weir & Robins.*

NEW *v.* BONAKER.

V.-C. M.
1867
July 30.

Charitable Trust—Disclaimer by Trustees—Foreign Charity—Cy près Doctrine.

A testator gave certain funds to the President and Vice-President of the *United States*, and the governor of *Pennsylvania*, upon trust to build and endow a college for the instruction of youth in the state of *Pennsylvania*, and directed that Moral Philosophy should be taught therein, and a professor should be engaged to inculcate and advocate the natural rights of the black people, of every clime and country, until they be restored to an equality of rights with their white brethren throughout the Union. The trustees disclaimed the gift:—

Held, that the Court, having no power to enforce the trust, nor to settle a trust for the administration of the charity *cy près*, the object had failed, and the funds fell into the residue.

12 Eq 203, 7 Ch 239

GEORGE ROBERTS, a British subject, by his will, dated in 1825, gave various sums of money, invested in American securities, to trustees, upon trust to pay the interest to his brothers and sisters, for their lives, in equal shares; and after the decease of the survivor of his brothers and sisters, he gave the principal of his North American stock to the President and Vice-President of the *United States*, and to the governor of the state of *Pennsylvania*, for the time being; to be by them holden upon trust to lay out and invest 2000 dollars, part thereof, in the purchase of freehold land in the state of *Pennsylvania*, and to accumulate the rents thereof, and the interest and dividends of the remainder of the said stock from time to time to be invested in other like stock in the nature of compound interest, until the same should amount to 100,000 dollars, and then to be applied, together with the estate so directed to be purchased, in endowing a college for the instruction of youth in the state of *Pennsylvania*. And the testator declared his will to be, that Moral Philosophy should be taught therein, and a pro-

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fessor engaged who should inculcate and advocate the natural rights of the black people of every clime and country, until they be restored to an equality in civil rights with their white brethren throughout the Union. The testator bequeathed the residue of his estate to his brothers and sisters, and appointed his two brothers executors of his will.

George Roberts died in October, 1828, in *Upper Canada*. The brothers and sisters of the testator were all dead, and their estate was represented by the Defendants. *Isaac Averill Roberts*, the last survivor of them, died in 1857; having by his will given all his personal estate to the trustees of the free grammar school at *Evesham*, in *Worcestershire*, and appointed them executors of his will.

The bill was filed in the year 1861, on behalf of the corporation of *Evesham*, who were trustees of the grammar school, for the administration of the trusts of the will of *Isaac Averill Roberts* and also of *George Roberts*, so far as they remained unperformed.

The bill stated that a memorial was addressed by the corporation of *Evesham*, in the year 1859, to the President and Vice-President of the *United States*, and the governor of the state of *Pennsylvania*, in which the facts relating to the bequest under the will of *George Roberts* were set out, and it was alleged that the said bequest was void, as being contrary to the English law of mortmain, and that in consequence of the failure of such bequest the legal personal representatives of the residuary legatees of the testator were entitled in equal shares to the property which the testator wished to apply in a manner which the law did not sanction, and also suggesting that as the government of the *United States*, and of the state of *Pennsylvania*, were unable to accept the trusts reposed in them for the endowment of the college, the trust funds should be left in the hands of the Plaintiffs for the purpose of distribution according to the law of *England*, which would place a portion of the said trust property in the possession of the free grammar school, and would transfer the remainder into the hands of the relatives of the testator *George Roberts*.

In answer to this memorial, a letter was received from the secretary to the governor of the commonwealth of *Pennsylvania*, dated

the 15th of April, 1859, which contained the following passage: "I am instructed in reply to say, that the memorial has been submitted to the Attorney-General of the state, and he is of opinion that the bequest in the will of *George Roberts* to the President and Vice-President of the *United States*, and to the governor of *Pennsylvania*, as trustees, cannot be enforced, and should not be, if it could, for the reason that the purpose of the devise is of doubtful utility, and the fund entirely inadequate to the endowment of an institution like the one named by the testator. In this view of the subject no action will be taken by the present governor to enforce the trust, although it is not considered proper to make a formal renunciation of the same."

A letter was also received from Mr. *Dallas*, the minister of the *United States* in *England*, dated the 10th of October, 1859, in which he stated that, by an official communication addressed to him, he was instructed that the President and Vice-President of the *United States*, and the governor of *Pennsylvania*, declined to accept the trusts created in their favour by the will of *George Roberts*.

The case came on upon motion for a decree before Vice-Chancellor *Kindersley*, in January, 1864, when the Court directed certain inquiries as to the property left by the testator *George Roberts*, and an inquiry whether the charitable purposes specified in the will, or any, and which of them, were or was according to the law of the state of *Pennsylvania*, or of the *United States of America*, capable of being carried into effect, and an inquiry whether the President and Vice-President of the *United States*, and the governor of *Pennsylvania*, or any and which of them, had accepted, or were willing to accept, the charitable trusts declared by the will of the testator.

In pursuance of these directions the Chief Clerk certified the result of the accounts taken in accordance with the decree, and he stated that the President and Vice-President of the *United States of America*, and the governor of the state of *Pennsylvania*, had not accepted the charitable trusts declared by the will, although called upon to do so; and it was submitted that, under the circumstances they should be considered to be unwilling to accept such trusts; and for these reasons it was submitted that it was now unnecessary to inquire further whether the charitable purposes

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specified were according to the laws of *Pennsylvania*, or of the *United States*, capable of being carried into effect.

Mr. *Glasse*, Q.C., and Mr. *Osler*, for the Plaintiffs:—

This is not a charity which can be carried out by the Court. The government of the *United States of America*, to whom the bequest is made, have declined to accept the trust, and the Court has no power to compel that government to act. If other trustees were to be appointed the intention of the testator could not be performed, since the amount is too small for the purpose indicated; the object is not such as can now be carried into effect without the consent of the American government; the special purpose proposed by the testator—that of establishing a professorship for inculcating the rights of the black men—is gone by, since the black population of the *United States* have already received their freedom. And this is not a charity which can be administered *cy près*, it being a charity in a foreign country.

Mr. *Walford*, and Mr. *Holland*, for some of the Defendants interested in the residue:—

In the case of *Attorney-General* v. *Sturge* (1), where there was a gift for the benefit of a school at *Genoa*, the Court held that it could not direct a scheme to carry into effect a charity in a foreign country. This charity cannot be administered except by a scheme, as it is not a gift to any particular institution, and the government of the *United States* having repudiated the trust, the Court has no power to enforce it. The object of the gift, which is for upholding the rights of the blacks, has, in fact, ceased to exist, and consequently it is as much a lapsed legacy as if it had been to an individual who had ceased to exist.

Mr. *Osborne*, Q.C., and Mr. *Sargant*, for other defendants interested in the residue:—

This is not a general charitable bequest. There is a special object, and in such cases the doctrine of *cy près* cannot be applied: *Attorney-General* v. *Bishop of Oxford* (2); *Cherry* v. *Mott* (3);

(1) 19 Beav. 597. (2) 1 Bro. C. C. 444 (n.)
(3) 1 My. & Cr. 123.

Clark v. *Taylor* (1); *Russell* v. *Kellett* (2); *Marsh* v. *Means* (3); *Jarman* on Wills (4). All these cases go to the point that where there is a special, and not a general object of charity, the Court will not administer the charity *cy près*.

Mr. *Wickens*, for the Attorney-General :—

This case does not come within the principle of the authorities cited; there is a direction to apply certain funds for an educational purpose, and as such it is a good bequest. The instruction of youth has at all times been held to be a good object of a bequest, and if it is impossible from any cause to carry it out in the terms specified, the Court must direct such an inquiry as will enable it to administer the fund for some other educational purpose similar to that which is pointed out. If the amount of the fund is not adequate to the endowment of a college, it may be applied for the benefit of an existing school, or the endowment of a professorship in connexion with some collegiate institution in *Pennsylvania*, and it cannot be said that there is no such object in the state.

Then it is argued that the charity must fail because the trustees have disclaimed, but it is a general principle that a charity can never fail for the want of trustees to carry it out.

It has no doubt been held that where there is a charitable gift to a corporation for the purposes for which that corporation was instituted, and the corporation has, in fact, ceased to exist, or if the corporation refuses the gift, then the object fails, just as a gift to an individual would fail if he were dead, or refused the gift. But if there is a gift to a corporation, or to an individual, for the purpose of carrying out a particular charitable object, then the corporation or individual would be a trustee for the charitable purpose, and the object will not be allowed to fail on account of the death or disclaimer of the corporation or individual: *Marsh* v. *Attorney-General* (5); *Attorney-General* v. *Ironmongers' Company* (6); *Da Costa* v. *De Pas* (7); *Whicker* v. *Hume* (8); *Mitford* v. *Reynolds* (9).

(1) 1 Drew. 642.
(2) 3 Sm. & Giff. 264.
(3) 3 Jur. (N.S.) 790.
(4) Vol. i. p. 224.
(5) 2 J. & H. 61.
(6) 2 My. & K. 576; Cr. & Ph. 208.
(7) Amb. 228.
(8) 7 H. L. C. 124.
(9) 1 Ph. 185.

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SIR R. MALINS, V.C.:—

The general principle is, that where there is a gift in such terms as this for the education of youth, and a particular form of education is pointed out, the gift will not fail as a gift for the general education of youth, although it may be impracticable to carry out the general object in the particular form prescribed. Nor can it be disputed that the gift would not fail because the trustees had disclaimed, as it is a rule that charitable bequests cannot fail for want of trustees. But, adhering to these general principles, this is a very extraordinary and exceptional case. It is a trust for the purpose of founding a college in *Pennsylvania* for the instruction of youth, with a superadded direction that Moral Philosophy should be taught therein, and that there should be a professor engaged who should inculcate and advocate the natural rights of the black people, of every clime and country, until they be restored to an equality in civil rights with their white brethren throughout the Union. This particular object of advocating the rights of the black people was, I believe, the prevailing motive of the testator in founding the college, but it seems that this intention cannot be carried into effect, because the equality of the black people has already been substantially established throughout the Union. This, however, goes only to the professorship, and if it were an educational bequest in this country it would not fail on account of part of the object being impracticable. It is said that there is no reason for applying a different rule when the gift is for an educational purpose in a foreign country; but this is altogether an exceptional case. First, it is a gift to the President and Vice-President of the *United States*, and to the governor of *Pennsylvania* for the time being. Now, it is an American charity, and therefore the President and Vice-President of the *United States* are, in fact, representing the government of the country. I consider, therefore, that it is a gift to the American government, and I can look upon it in no other light. Then I find that there was a decree made by Vice-Chancellor *Kindersley*, in February, 1864, directing an inquiry whether or not the President and Vice-President of the *United States*, and the governor of *Pennsylvania*, would accept the trusts created by the will. It now appears that those trustees have refused to come forward and claim the fund,

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and consequently, as the matter now stands, the fund is useless. When I found that this question was pending, and the matter was standing still in my Chambers, I directed a certificate to be made, for the purpose of bringing it before the Court. The question now is, whether, as the American Government has refused to come forward, I am to force the trust upon them. It is said that a charitable bequest must never fail for want of a trustee, and that is perfectly true, but what I am urged by the Attorney-General to do, is, to force on the government of *America* the foundation of a charity which they will not have. The will directs that the college is to be founded in *Pennsylvania*, and the governor of *Pennsylvania* refuses to accept the trust; therefore, what I should have to do would be, to settle a scheme for the institution of this charity in *Pennsylvania*, but I have no power to make the governor accept it. It is quite impossible to settle such a scheme, therefore I come to the conclusion that this is a case in which the charitable object altogether fails, and the funds will fall into the residue.

Solicitors for the Plaintiffs: Messrs. *C. & H. Bell.*
Solicitors for the Defendants: Messrs. *White & Sons.*
Solicitors for the Attorney-General: Messrs. *Raven & Bradley.*

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Liability of Trustees—Power of Advancement—Discretion—Advancement after Institution of Suit—Costs.

If after the institution of an administration suit trustees take upon themselves to make advances, the Court will require the clearest evidence that the discretion has been exercised *bonâ fide*, and after the most mature investigation; and will impose upon the trustees the expense of such proof.

The Court being of opinion that the Defendants, the trustees, had not *bonâ fide*, but for the purpose of defeating the interest of the Plaintiffs, exercised their power, directed the amount of such advances to be restored and brought into Court, and the costs occasioned by their misconduct to be paid by the trustees.

A power of advancement for setting-up sons and daughters in business will not entitle trustees to make advances for such a purpose to a married daughter; nor for the purpose of paying the debts of a daughter's husband.

Varied by L.J. 3 Ch. 621.

JAMES SEYMER, of *East Stoke*, in the county of *Dorset*, miller, by his will, dated the 6th of March, 1845, gave and bequeathed

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all the property he should die possessed of to *Thomas Randall*, a farmer, and *Robert Dugdale Marshfield*, of *Wareham*, solicitor, upon trust to sell and convert the same into money, and stand possessed of £1000, part of the proceeds thereof, in trust to pay the interest to *Jane*, the testator's wife, during her life, and as to the residue and remainder of the proceeds of his estate, and also the £1000 after the death of his wife, upon trust to invest the same in government or real securities, and to pay two-thirds of the interest arising therefrom in equal proportions between his three sons, *Joelah Seymer*, *Moses Seymer*, and *Humphry Seymer*, during their lives, and to pay the remaining one-third of the interest in equal proportions between his three daughters, *Sarah Seymer*, *Martha Seymer*, and *Matilda Seymer*, during their lives, for their separate use, and after the decease of his sons and daughters, when and so soon as it should happen to each, or any, or either of them respectively, then he directed his trustees to stand possessed of the share to which the son or daughter respectively so dying was entitled for life, upon trust for such of the children of the same son or daughter as should be living at his or her decease, and such of the issue of any child or children of the said son or daughter then dead leaving issue as should be living, to take as tenants in common. And in case there should be no child or issue of a child of any such son or daughter respectively so dying who should become entitled under the aforesaid trusts, then the trustees should stand possessed of the share or shares of his said sons and daughters respectively whose issue should so fail, in trust for such of his grandchildren as should be living at the decease of the same sons and daughters respectively, their executors, administrators, and assigns, equally between them as tenants in common. And the will contained the following proviso:—

"Provided always, and it is my will and desire, that if my said trustees or trustee for the time being shall, in their discretion, consider my said sons and daughters, or any or either of them, capable of managing, and that it would be conducive to their, his, or her interest to embark in or otherwise carry on any trade or business, then I hereby authorize and empower my said trustees for the time being to sell out or call in the whole or any part of the share or shares of the said principal moneys, stocks, funds, and

securities, to a life interest in which such son or daughter, or sons and daughters, respectively shall or may be entitled under the provisions hereinbefore contained, and to transfer and pay over the produce of such share or shares unto the same son or daughter, or sons or daughters, respectively for setting them up in business as aforesaid, and the receipts of any such son or daughter respectively to my said trustees or trustee shall be sufficient discharges to them or him for the same produce, notwithstanding anything in this my will contained to the contrary."

And the testator appointed *Thomas Randall* and *Robert Dugdale Marshfield* executors in trust of his will.

The testator died in April, 1848, and the trustees, shortly after his death, converted his estate into money, and the same was invested in the sum of £5279 13*s.* 1*d.* government stock.

The testator had seven children, namely, the six mentioned in his will, and also *Mary Jane Seymer*.

Moses Seymer and *Matilda Seymer* were alive when this suit was commenced, but had never been married. *Humphry Seymer* died a short time since, leaving his widow, *Mary Seymer*, and one child, namely, *Jane Seymer*, who had since married *Richard Austin*, and had received her father's share of the estate. *Mary Jane Seymer*, many years since, married *Peter Talbot*, deceased, and died some time before the death of the testator, having had six children, namely, *Mary Ann Talbot*, and *Sarah Talbot*, who were the Plaintiffs in this suit; another who died in 1845, another who married, and was living in *America;* and the remaining two were believed to have died abroad nine or ten years ago.

Sarah Seymer married *Thomas Ricks*, and died in August, 1864, without having had any issue. In the years 1850 and 1851 £586 12*s.* 6*d.* had been transferred to Mrs. *Ricks* to pay her husband's debts.

Martha Seymer married *Edward Clarke*, but had never had any issue. *Joelah Seymer* had not been heard of for many years, and it was not known whether he was living or dead; but at the time he was last heard of he had never been married. *Jane Seymer*, the widow of the testator, died in October, 1851.

In December, 1853, the trustees transferred into Court, under the *Trustees Relief Act*, the sum of £1173 5*s.* 1*d.*, being the share

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to which *Joelah Seymer* would have been entitled; and an order was made by the Court directing its distribution amongst the grandchildren.

The interest of the remaining sum was regularly paid to the remaining tenants for life, from the testator's death until the year 1863—a period of fifteen years—at which time *Moses*, whose occupation had been that of a journeyman miller, was sixty-four years of age. *Sarah Ricks* was sixty-nine, *Martha Clarke* was sixty-five, and *Matilda Seymer* was forty-nine years of age.

In this state of things, the correspondence relating to the suit commenced with a letter dated the 28th of August, 1863, from the Plaintiffs' solicitors to *Marshfield*, requesting information as to the interest, if any, of the Plaintiffs under the will. After some correspondence, in the course of which *Marshfield* intimated that if the power in the will should be exercised the Plaintiffs would be deprived of all claim, this bill was filed on the 20th of June, 1864, asking for the common administration decree.

A correspondence then took place between the respective solicitors, in the course of which the trustees' solicitors wrote to the Plaintiffs' solicitors, informing them that the Defendants, the trustees, intended forthwith to exercise the discretion reposed in them by the will, and pay to *Moses Seymer*, and Mrs. *Clarke*, and *Matilda Seymer*, their shares of the moneys payable to them, and that consequently, the only share in which the Plaintiffs could have any interest, would be the share of *Joelah Seymer*.

The answer was filed on the 10th of August, 1864, in which the Defendants stated the transfer to Mrs. *Ricks* in the years 1850 and 1851, and set forth their intention of making similar advances to the other children.

On the 12th of November the Defendants' solicitors wrote to the Plaintiffs' solicitors, stating that the Defendants would, on the 22nd instant, unless previously restrained by an order of the Vice-Chancellor, transfer to the persons already mentioned their respective shares in the testator's residuary estate.

On the 17th of November an application was made for an order directing the Defendants to pay into Court the sum of £2346 10*s.* 2*d.*, admitted to be in their possession. Upon that occasion *Marshfield*, *Martha Clarke*, *Moses Seymer*, and *Matilda*

Seymer, were cross-examined *vivâ voce*, and a letter was produced in which the tenants for life formally applied to the trustees that these sums should be advanced to them for the purpose of enabling them to embark in business. Mr. *Marshfield* stated, in his evidence, that he had been frequently applied to by the tenants for life for advances, but the applications were refused, except as regarded Mrs. *Ricks*. He also stated that it was now proposed to set these people up in the coal trade in partnership with a stepson of Mrs. *Clarke*, and that this project had occurred to them for the first time after these disputes had arisen. The tenants for life, in their evidence, stated that they had importuned Mr. *Marshfield* for fifteen years to let them have their shares of the money, but he had always refused to do so. The result of the application to Vice-Chancellor *Kindersley* was, that His Honour did not order the money to be brought into Court. The Vice-Chancellor, in giving judgment, observed that it was Mr. *Marshfield's* duty to see that the parties were capable of managing the proposed business, and to exercise his discretion as to whether it would be desirable for them to embark in it, and, without interfering with the trustees in the course they might think fit to take, His Honour directed that the motion should stand over till the hearing, when, if it was found that the trustees were unable to carry out the proposal respecting the coal trade, it might be right to have the money brought into Court. His Honour saw no sufficient ground for imputing *mala fides* to the trustees, or that they were acting in this manner merely to escape their liability to account; but it must be left open to the Plaintiffs to impeach the application of the moneys in any way they might be advised.

The day after the decision of Vice-Chancellor *Kindersley*, the Plaintiffs' solicitors wrote to the Defendants' solicitors, saying they would be glad to know whether the Defendants would, and for how long a time, abstain from parting with the fund, and whether, in the event of their seeking to deal with it, they would keep Messrs. *Bell* informed of the circumstances, and whether they intended to retain a sufficient sum to answer the costs of the suit.

On the 29th of December following the managing clerk of the Defendants' solicitors went down to *Wareham* for the purpose of carrying out the arrangement as to the partnership in the coal

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trade; but this project altogether fell to the ground on account of Mr. *Clarke* declining to take the tenants for life into partnership with him.

A negotiation was then entered into to put these persons into business, not in the coal trade, but in partnership as farmers with the son of the co-trustee, *Thomas Randall*, and accordingly on the 16th of February, 1865, the whole of the trust funds were sold out by the Defendants, and advanced to *Randall* the younger without any information of such an intention being given to the Plaintiffs or their solicitors. The fund produced £2069 11*s.* 1*d.*, and after a deduction for costs, the sum actually paid over amounted to between £1700 and £1800.

In May, 1865, being two months after the Defendants had parted with the whole fund, they moved to dismiss the administration suit for want of prosecution.

On the 1st of June, 1865, the motion to dismiss was argued before Vice-Chancellor *Kindersley*, and was refused with costs.

After further amendment, and answers, the cause now came on upon the hearing.

Mr. *Glasse*, Q.C., and Mr. *Dixon*, for the Plaintiffs:—

The questions in this case are, whether the trustees had power under the will of the testator, *James Seymer*, to advance any portion of the shares of married women to their husbands, and whether they were justified, under the circumstances of the case, in advancing money to these elderly persons to set them up in a business for which they were disqualified, owing to their age and previous habits. The share that belonged to Mrs. *Ricks* was advanced to pay the debts of her husband, and this exercise of the power could, under no consideration, come within the meaning of the clause, which was confined to setting the children up in business. The same may be said as regards the share of Mrs. *Clarke*. Being a married woman, she could have no business which was not her husband's business, consequently the advance was made to the husband, and not to the tenant for life herself.

Then, with regard to the advances made to the other tenants for life, there are two questions—whether the trustees were justified in advancing the money for the purposes and under the peculiar cir-

cumstances of the case; and whether they were justified in advancing it without the sanction of the Court after a bill had been filed. The three persons in question were of a very advanced age; they had never been in any kind of business. The trustees had repeatedly refused to make advances to them during fifteen years, and it was only after the institution of these proceedings that they ever thought of such a thing. There can be no doubt whatever that the advances were threatened for the purpose of avoiding the necessity of producing accounts and to defeat the interests of the Plaintiffs. Still, by whatever motives they were influenced, the Court could not interfere if they were acting *bonâ fide* strictly within the power. This was the opinion of Sir *R. T. Kindersley*, when the case originally came before him, His Honour having left it open to the Plaintiffs to impeach their conduct if their discretion was not properly exercised: *Talbot* v. *Marshfield* (1).

But the trustees have put themselves entirely in the wrong. Whether the original object of putting these people into business in the coal trade was intended *bonâ fide* or not, it failed. But having failed in this scheme, the trustees then looked about for some other means of defeating the Plaintiffs' interest. The coal trade not being open to them, they entered into another project, and with undue precipitancy, without considering whether their *cestui que trusts* were adapted to the business of farming or not, and without giving any intimation of their intention to the Plaintiffs, they advanced the whole of the undisposed of shares.

There is no evidence to shew what were the prospects of the partnership, and the principal in this partnership was the son of one of the trustees. The latter scheme was, in fact, quite as absurd as the former one for establishing these people in the coal trade. They were not only aged, but infirm, at the time. Then, as to the law of the subject, there is sufficient authority to shew that, under any circumstances, the trustees were not justified after the institution of the suit in making any advances whatever without the sanction of the Court: *Costabadie* v. *Costabadie* (2); *Attorney-General* v. *Clack* (3). These cases are also a sufficient authority

(1) 2 Dr. & Sm. 285.

(2) 6 Hare, 410.

(3) 1 Beav. 467.

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for the Court to make the Defendants pay the costs of the proceedings, which have been vexatious and unjustifiable.

Mr. *J. H. Palmer*, Q.C., and Mr. *J. Napier Higgins*, for the Defendants:—

These trustees have no interest whatever in the fund. All they had to do was to exercise their discretion under the power of advancement, and the onus lies upon the Plaintiffs to shew that they have not exercised that discretion *bonâ fide*. When the case was before Vice-Chancellor *Kindersley*, His Honour was of opinion that there was no ground for imputing *mala fides* to the trustees, and he saw no objection to the money being advanced to set these people up in the coal trade. If such an advance would have met with the sanction of the Court, why should not the business of farming be just as well adapted to them? The advances were made at their own request. There is no reason for impeaching the conduct of the trustees, except on the ground that they wished to avoid accounting. This ground is done away with since they have, by the schedule to their answer, set forth fully all the particulars of the accounts. Then it is said, that while the suit was pending, the trustees should not have exercised their discretion without coming to the Court, but in the case of *Sillibourne* v. *Newport* (1), it was held that the trustees were justified in exercising their discretion under a power to advance, notwithstanding a bill had been filed to have the trusts of the will carried into execution. In cases like these a trustee who acts *bonâ fide*, and exercises an honest discretion in the performance of his duties, is not chargeable with any loss that may occur, and he is entitled to act on his own judgment in exercising a power of this nature: *Selby* v. *Bowie* (2). It has been argued that the advancement made to the married woman was not within the power, but there is no restriction of this nature in the clause, and it is equally for the benefit of the tenant for life whether she has the money or her husband. The Court will look to see whether the advancement is reasonably within the power. This was the view taken by the Court in *Edwards* v. *Grove* (3).

Mr. *Glasse*, in reply.

(1) 1 K. & J. 602. (2) 11 W. R. 606. (3) 2 D. F. & J. 210.

Aug. 3. Sir R. Malins, V.C.:— V.-C. M. 1867 TALBOT v. MARSHFIELD.

The first question I have here to determine is, what are the consequences of the advances made by these trustees to the tenants for life, for the purpose of what is called putting them into business? If those sums were fairly and properly advanced within the powers of the will, the interest of the Plaintiffs would have altogether ceased. If, on the other hand, those sums were improperly advanced, and the trustees are bound to restore those moneys, the Plaintiffs must have a decree. Now, the sums advanced consist of four. The first sum stated to have been advanced was, many years ago, to the eldest daughter, Mrs. *Ricks*. Mrs. *Ricks* had married at that time; she was past child-bearing, and had no issue; and being a married woman, the trustees thought fit to advance the money to pay her husband's debts. I am bound to say that I think those advances were made in good faith, and I was so much impressed with that fact, that during the argument I made a suggestion that the Plaintiffs should allow those sums; because although, according to my view, they were erroneously advanced, I think it was done honestly and in good faith, and I should certainly have been glad if the Plaintiffs had acceded to allowing them, and I should also have been glad if my other suggestion had been acceded to, that, inasmuch as these three people were put into business in 1865, the trustees should have realized the security, and brought these three shares back. These suggestions, however, were not acceded to, and I have to decide the question according to the strict rights of the parties.

Now, the words of the will are these: "Provided always, and it is my will and desire, that if my said trustees or trustee for the time being shall, in their discretion, consider my said sons and daughters, or any or either of them, capable of managing, and that it would be conducive to their, his, or her interest to embark in or otherwise carry on any trade or business," they are to sell out the funds. The power must be considered as confined to the sons and daughters of the testator. What has been done with reference to Mrs. *Ricks* has been, not to advance money to put her into business, but to pay her husband's debts, and I accede to the argument on behalf of the Plaintiffs, that this power does not authorize the trustees to advance money to the husband of a married daughter

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at all. The object of the testator is, that his children shall be put into business, he does not mean that a son-in-law is to be put into business; he assumes that when his daughters marry they no longer require to be put into business, and that their husbands will support them.

Therefore, I am bound to declare, as I do, that however well meant those advances to Mrs. *Ricks* were, they were altogether beside the power. The property in Mrs. *Ricks's* share was vested in the grandchildren, subject to the right of the tenants for life, and subject to the exercise of this power. I declare, therefore, that the advance to the husband of the daughter was not within the power; and it will be part of my decree that they restore the share of Mrs. *Ricks*, with interest at 4 per cent. from her death.

Then, with regard to Mrs. *Clarke*, she also, in February, 1865, being a married woman, was put into business, while, in point of fact, any money advanced was advanced to Mr. *Clarke*, and if she was in business, as a married woman she would not properly be able to carry on that business, but it would be Mr. *Clarke's*. The trustees must therefore restore this share also.

Then the only question which remains is with regard to the shares of *Moses* and *Matilda*. Now, *Moses* and *Matilda* are both dead. The right to their shares, therefore, if the Plaintiffs have any interest in it, is in possession, the life estate having expired. If the moneys were properly advanced to them they are gone. If improperly advanced, the trustees must produce the amount, ready to be paid over to the Plaintiffs. Now, inasmuch as *Moses* and *Matilda* were children of the testator, and as such objects of the power, the question is, whether the power was properly exercised in their favour? There were some authorities referred to, but I do not think it necessary to go into them; because I apprehend they all proceed upon the general principles of the Court upon such subjects, which are thoroughly settled. They are these: that the mere filing of a bill does not necessarily deprive a trustee of the discretion which is vested in him; but if a trustee thinks fit to exercise a discretion reposed in him after a bill is filed, the Court will require of him the clearest evidence that he exercised the discretion *bonâ fide*, and after the most mature investigation. That will be found laid

down in the case of *Costabadie* v. *Costabadie* (1); but I refer particularly to the *Attorney-General* v. *Clack* (2), a decision of Lord *Langdale*, where somewhat similar circumstances existed. The marginal note states what the case was. "Pending an information filed for the purpose of having new trustees of a charity appointed in the place of some who were dead, the surviving trustees took upon themselves, without the sanction of the Court, to appoint new trustees:—Held, that though this was neither a contempt, nor an act altogether void, yet it imposed upon the trustees the necessity of proving, by the strictest evidence, and at their own expense, that what had been done was perfectly right and proper; and the case not appearing altogether clear, the appointment was set aside, and the trustees were ordered personally to pay all the extra costs occasioned by their act." In that case Lord *Langdale* lays down the rule, that even if it turned out on investigation that what the trustees had done was proper, the expense of proving that would fall upon them, because it was an act of impropriety not to submit the matter to the Court. He says, "it imposed upon them the proof, and they were bound to prove by the strictest evidence, that what they had done was perfectly right and proper, and also imposed on them the necessity of paying the costs of such proof." Upon that authority, as well as upon principle, I say that the existence of the suit threw upon these Defendants the obligation of proving, by the strictest evidence, that what they had done was perfectly right and proper, and also imposed on them the necessity of paying the expense of that proof, even if it turned out to be right and proper.

This rule more particularly and emphatically requires that, under the circumstances I have adverted to, after the institution of this suit, these trustees should have exercised their discretion as to this; and, in exercising their discretion, one of their primary duties was to ascertain that the business in which the *cestuis que trusts* had embarked was a profitable business. That they totally omitted to do. They made no inquiry as to the profits, because the gentleman with whom they were embarked in business was the son of one of the co-trustees, and that fact disqualified him from exercising a fair and unqualified judgment; and undoubtedly Mr.

(1) 6 Hare, 410. (2) 1 Beav. 467

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Marshfield and Mr. *Randall* did not, in my judgment, exercise that degree of discretion required of them. I also come to the conclusion that they did not satisfy themselves that it would promote the interests of these children. You have only to look at the position of the matter. Take *Moses*, an aged journeyman miller, according to his own statement in cross-examination, almost past work: if this money was lost, he was left destitute, and there was no resource for him but the workhouse. Therefore, with regard to that, see what fatal consequences would have accrued if this money had been lost—*Moses* would have been left totally destitute; and the same observations apply to *Matilda*. Therefore, I am of opinion that the circumstances were such that it was impossible for any discreet person to have come to the conclusion that this was a proper thing to do. It was not conducive to the interests of these children; and I am perfectly satisfied in my own mind that, if the correspondence of 1863 had not been opened, and this suit had not been instituted, to this very hour the whole of the money would have been forthcoming. The tenants for life are dead, the right of possession of the Plaintiffs is complete, and I treat these trustees as liable.

Having carefully, again and again, examined these papers, I come to the conclusion that the object of this advance was not *bonâ fide* to put these aged persons in business, but to defeat the claim of the Plaintiffs. Under these circumstances I can have no hesitation in deciding that the whole of this money must be restored. I believe it was stated that the trustees took security for the advance of the three shares, in February, 1865. I hope those securities are available to them; but, whether they are or not, they must bring the money back; every farthing must be restored which was then advanced, and the parties must be put in the same position as if no such advance had ever been made; and there will be interest from the death of each tenant for life. Therefore the order will apply to the share of Mrs. *Clarke*, which was improperly advanced to the husband, the share of *Moses*, and the share of *Matilda*, as well as to the share of Mrs. *Ricks*.

There is also, I may observe, another construction which I put upon this power, totally different from that which the trustees have put. I do not think it at all follows, that because this money was

to be advanced to put these children (once children but now aged persons) into business, that the capital was to be lost. If they were going to put them into business they had no right to do so unless it was a paying business. If it was a paying business the capital would be restored on their death—restored, not for the benefit of the tenants for life, but for the benefit of those in remainder. On that ground I come to the conclusion against these Defendants. Considering their great incapacity for business, it was the duty of the trustees, for their own protection, to take security for the restoration of the capital when its purpose had been accomplished; and they have taken an erroneous view in treating this as a power which enabled them to advance the money, and thereby to deprive the Plaintiffs, the reversioners, of all interest in it.

The consequence of this decision will be, that there must be a common administration decree; a decree which ought, in fact, to have been made a week after the bill was filed, as upon a short cause.

That most important question remains, who is to pay the costs? Now, the principles of this Court with regard to the duties of trustees are well understood, and are very plain, and they never can, with propriety, be departed from. Those rules, as I understand them, are these:—that, if a trustee conducts himself fairly and properly, having a due regard not only to some of his *cestuis que trusts*, but to all; indifferently regarding the interest of all, and seeing, while he is doing something for the benefit of a tenant for life, that he is not disregarding the interests of those in remainder—he will receive from this Court every protection incidental to his position. But if a trustee shews by his conduct that he favours one at the expense of another *cestui que trust*, that, instead of honestly exercising a discretion, he exercises it in a wanton, careless, manner, to the advantage of one, and to the detriment of another; and if, above all, he omits that paramount duty of a trustee, which is, to have his accounts ready and open for inspection at all times, and to give the fullest information to all who are interested in the trust, whenever they require it; that is conduct which the Court will not tolerate. If a trustee complies with his duties the Court will protect him, but if he fails

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in them the Court will make him pay the costs. I have, therefore, a case here, in which the whole course of conduct, from the beginning to the end, has been vexatious, irritating, and unjustifiable, and I can have no hesitation in coming to the conclusion, as I do, that these Defendants must pay the whole of the costs occasioned by the most improper proceedings in which they have embarked, and I order them to pay the costs accordingly.

I have had some hesitation whether I ought not to make them pay every farthing of the costs from the beginning to the end. It is with considerable reluctance, looking at their conduct, that I come to the conclusion, that from the general costs I must make some deduction, and that deduction must be such an amount as would have been the proper amount of costs if this suit had been conducted, as it ought to have been, as a common administration suit. This is one of the simplest cases that ever was presented to the Court, and I do not believe that if the accounts had been produced there would have been any cavil whatever, and probably £100 would have paid the whole of the expenses of the suit on both sides. In such cases as these I have heard the late Lord Chief Justice *Knight Bruce*, on many occasions, exercise his own discretion in naming a sum, and I shall take this matter into my own hands, and direct a sum of £200 to be deducted, which, according to my estimate, is the utmost that the costs of a proper suit would have amounted to.

There will be a common administration decree, the costs to be taxed, and from the amount of taxation £200 to be deducted, which is to be paid out of the estate, and the balance to be paid by the Defendants.

Solicitors for the Plaintiffs: Messrs. *C. & H. Bell.*
Solicitors for the Defendants: Messrs. *Harrison, Lewis, & Co.*

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V.-C. M.
1867
Feb. 26;
March 22.

Proof under Bankruptcy—Set-off—Legal Personal Representative—Retainer.

A residuary legatee of a testator, part of whose assets consisted of a debt, died intestate, leaving the debtor one of his next of kin:—

Held, that the administratrix *de bonis non* of the testator, who was also administratrix of the intestate, could not retain the debt out of the debtor's distributive share in the intestate's estate.

The executor of the testator proved the debt under the debtor's bankruptcy, and received a dividend on the proof:—

Held, that he had not thereby abandoned or lost the right to retain the debt, less the dividend, out of the share of the bankrupt, as one of the residuary legatees.

Rood Ct. L. C. 3 Ch. 195.

THIS bill was filed by the Plaintiffs as the assignees in bankruptcy of *William Payne*, for the recovery of five sums of money to which the bankrupt was entitled under a settlement and will, and three intestacies.

The Defendants, *Emma Elliott* and her husband in her right, held all these sums as legal personal representative of the last surviving trustee of the settlement, and legal personal representative of the testator, and of the three intestates, and they claimed to set off against the aggregate of all the five sums certain other sums alleged to be due from the bankrupt to the testator's estate and to the deceased trustee.

The settlement was dated the 16th of October, 1818, and was made between *Joseph Tiercelin* and *Jane* his wife (both deceased), of the one part, and *John Joseph Tiercelin* and *William Payne* (both deceased) of the other part, and under it the bankrupt was entitled, as one of the four children of *Mary Ann Payne*, to the sum of £465 7*s.* 6*d.*, which sum was now in the hands of the Defendant *Emma Elliott* (another child of *Mary Ann Payne*), as the legal personal representative of *John Joseph Tiercelin*, the last surviving trustee of the settlement.

The will, which was dated the 2nd of April, 1830, was that of the said *Joseph Tiercelin*, who died in December, 1836, and under it the bankrupt was entitled, as one of the residuary legatees in remainder expectant on the death of *Mary Ann Payne*, to the sum

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of £223 19*s.* 1*d.*, which sum was in the hands of the Defendant, *Emma Elliott*, as the present legal personal representative of the testator.

One of the intestacies was that of the bankrupt's mother, *Mary Ann Payne*, deceased, and he was entitled under it to £229 15*s.* 6*d.*, which was his distributive share, and was now in the hands of the Defendant, *Emma Elliott*, as the administratrix of *Mary Ann Payne*.

Another of the intestacies was that of *Joseph Payne*, a brother of the bankrupt, and also one of the residuary legatees of *Joseph Tiercelin*, and the bankrupt was entitled under it to a sum of £172 6*s.* 8*d.*, which sum was now in the hands of the Defendant, *Emma Elliott*, as the administratrix of the estate of *Joseph Payne*.

The remaining intestacy was that of *Mary Ann Payne* the younger, the sister of the bankrupt, and another of the residuary legatees, and under it he was entitled, as one of her next of kin, to a sum of £287 4*s.* 5*d.*, which was in the hands of *Emma Elliott* as the administratrix of the estate of the sister.

The sums claimed to be set off against these demands were: first, a sum of £850, with interest, which had been originally lent to the bankrupt by the testator in 1834, and for which, after the testator's death, the bankrupt gave to his executors, *John Joseph Tiercelin* and *Richard Spike*, a bond, dated the 9th of February, 1837; and, secondly, a sum of £150, lent to the bankrupt by *John Joseph Tiercelin*, for which he had given his promissory note.

Richard Spike died in the lifetime of his co-trustee and co-executor *John Joseph Tiercelin*. In March, 1856, the adjudication of bankruptcy took place, and in the same month *Mary Ann Payne*, the tenant for life, died.

On the 7th of March, 1857, *John Joseph Tiercelin* proved, under the bankruptcy, for the £850 and £150, making no mention of any lien, right of retainer, or other security, and he afterwards received dividends on his proofs.

In 1859 he died, and the Defendant, Mrs. *Elliott*, became his administratrix.

She also took out administration *de bonis non* to *Joseph Tierce-*

lin, and letters of administration to her mother, and to *Joseph Payne*, and Miss *Payne*, her other brother and her sister.

Mr. *De Gex*, Q.C., and Mr. *Surrage*, for the Plaintiffs, the assignees of the bankrupt:—

As to the shares under the settlement and the intestacies, there can be no question, for the debts sought to be set off were due, one of them to *Joseph Tiercelin*, who was, under the settlement, merely a *cestui que trust*, as the bankrupt himself was, and another due to *John Joseph Tiercelin*, who was formerly a trustee of the settlement, whereas the sums claimed are payable by the Defendants out of the settled property, and out of the assets of the deceased intestates: *Freeman* v. *Lomas* (1).

As to the share under the will, even if the debt due to the testator might have been claimed from, or retained out of, the bankrupt's share under the will, any such right of retainer was abandoned and given up, and the debts in respect of which it was sought to be exercised were extinguished or satisfied by the fact that *John Joseph Tiercelin*, who was then the surviving executor of the testator *Joseph Tiercelin*, and as such entitled to the £850 secured by the bond of the bankrupt, and in his own right entitled to the £150 secured by the promissory note, came in under the bankruptcy and proved, and afterwards received dividends to the amount of £9 7*s.* 6*d.* The same argument would have also applied to the shares under the settlement and the intestacies, if these could have otherwise been the subject of retainer or set-off, as we have shewn that they could not: *Ex parte Solomon* (2); *Ex parte Downes* (3); *Ex parte Hornby* (4); *Ex parte Eggington* (5); *Ex parte Rolfe* (6); *Kingsford* v. *Swinford* (7).

Mr. *Glasse*, Q.C., and Mr. *Whitbread*, for the Defendants:—

As to the share under the will, this is a clear case of retainer: *Smith* v. *Smith* (8). Nor does the proof affect the right, for *John Joseph Tiercelin*, being a trustee, had no power to give up the right

(1) 9 Hare, 109, 114.
(2) 1 Gl. & J. 25.
(3) 18 Ves. 290; 1 Rose, 96.
(4) Buck, 351.
(5) Mont. 72.
(6) 3 Mont. & A. 305.
(7) 4 Drew. 705.
(8) 3 Giff. 263.

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of retainer, to the prejudice of his *cestuis que trust: Ex parte Dicken* (1); *Ex parte Turney* (2).

As to the shares under the settlement and the intestacies, the intestates had become directly entitled to the sums originally due from the bankrupt to the testator, and to *John Joseph Tiercelin*, and therefore the bankrupt had, in fact, received to that extent his shares under the settlement and the intestacies: *Bousfield* v. *Lawford* (3).

Mr. *De Gex*, in reply.

March 22. SIR R. MALINS, V.C.:—

The title of the bankrupt to all these sums being perfectly clear and admitted, the payment of them to the Plaintiff is resisted by the Defendants on the ground that the bankrupt was indebted to the estate of the testator *Joseph Tiercelin* in the sum of £850, which was lent to him by the testator in 1834, and the payment of which, with interest, was secured by the bond of the bankrupt, dated 9th of February, 1837, to *John Joseph Tiercelin* and *Richard Spike*, who were the executors of the testator, *Joseph Tiercelin;* and also on the ground that the bankrupt was indebted to the estate of the testator, *John Joseph Tiercelin*, in the sum of £150, which that testator lent to him at the same time that the testator, *Joseph Tiercelin*, lent him the £850, and the repayment of which, with interest, was secured by the promissory note of the bankrupt, also dated 9th of February, 1837. The amount due on the bond and promissory note the Defendant, *Emma Elliott*, as the legal personal representative of both these testators, claims the right to retain as against the bankrupt and the Plaintiffs as his assignees. Assuming that the right of retainer would otherwise have existed, the Plaintiffs contend that the debts in respect of which it is sought to be exercised, were wholly extinguished or satisfied by the fact that *John Joseph Tiercelin*, who was then the surviving executor of the testator, *Joseph Tiercelin*, and as such entitled to the £850 secured by the bond of the bankrupt, and in

(1) Buck, 115. (2) 3 M. D. & De G. 576.
(3) 1 D. J. & S. 459.

his own right entitled to the £150 secured by the promissory note, came in under the bankruptcy and proved for the sum of £1000, and afterwards received a small dividend of £9 7*s.* 6*d.* under such proof. It is, however, settled by the language of Sir *G. J. Turner* in *Freeman* v. *Lomas* (1) that, except under special circumstances, Courts of equity do not allow, any more than Courts of law, cross demands existing in different rights to be set the one against the other. The rule so stated is supported by numerous authorities, which were cited and commented upon in the case, and it is not therefore necessary further to refer to them. In the present case the debts in respect of which the right of retainer (which assumes the right of set-off) is sought to be exercised, are due to the Defendant, *Emma Elliott*, as the legal personal representative of the testators, *Joseph Tiercelin* and *John Joseph Tiercelin*, and four of the debts which she seeks to set off or retain against such debts are due from her as the present trustee of the settlement of the 10th of October, 1818, and the legal personal representatives of the mother and brother and sister, to whose estates the bankrupt was in no way indebted. It is clear, therefore, upon the authority of *Freeman* v. *Lomas*, and the decisions upon which that case was founded, that these four debts, being due from Mrs. *Elliott*, in a totally different right from that in respect of which the debts of £850 and £150 are due to her, there can be no such right of set-off as is claimed, and that the defence wholly fails as to these four debts, which must consequently be paid to the Plaintiffs. The decision of the Lords Justices in *Bousfield* v. *Lawford* (2) is quite consistent with this view of the law, because their Lordships there considered the debt which the bankrupt owed to the estate of the testator as having become the property of the mother of the bankrupt as residuary legatee of the testator, and that her executors had therefore the right of retainer out of the bankrupt's share of her estate. The language of Lord Justice *Knight Bruce* (3) is precise on this point. But the other debt of £223 19*s.* 1*d.* being due from the Defendant, Mrs. *Elliott*, as legal personal representative of *Joseph Tiercelin*, and the bond debt being due to her in the same character, the right of set-off or retainer to the extent of that debt is clear, if it has not been barred by the proof

(1) 9 Hare, 109, 114. (2) 1 D. J. & S. 459. (3) 1 D. J. & S. 464.

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under the bankruptcy by *John Joseph Tiercelin*, who was at the time of the proof the sole surviving executor of the testator. Numerous authorities were cited at the bar, which clearly establish that a simple proof of a debt under the bankruptcy of the debtor is an abandonment of all securities, and is, in fact, equivalent to payment. Of the authorities on this subject it is sufficient to mention *Ex parte Downes* (1); *Ex parte Solomon* (2); *Ex parte Hornby* (3); *Ex parte Rolfe* (4); *Kingsford* v. *Swinford* (5). It was urged by the counsel for the Defendant, and particularly by Mr. *Glasse*, that the share of the residue of the testator belonging to the bankrupt, in respect of which the right of retainer existed, being reversionary, was not a security which could be abandoned by the proof under the bankruptcy; but the decisions above referred to proceed upon the principle that the proof is a satisfaction of the debt, and the debt being satisfied, it follows that there could have been no retainer in respect of it at a subsequent period, when the reversionary interest of the bankrupt under the will fell into possession. If, therefore, *John Joseph Tiercelin* had been absolutely entitled to this debt, in respect of which he proved, I should have been of opinion that the proof would have been a conclusive bar to the right of retainer which is claimed in respect of this debt. But the debt in question was part of the residuary estate of the testator, *Joseph Tiercelin;* of which residue *John Joseph Tiercelin*, as the surviving executor of the will, was a trustee for various persons. In *Ex parte Dicken* (6) it was decided by Lord *Eldon* that where a debt secured by the covenant of a bankrupt with the trustees of his marriage settlement was a lien upon a real estate for the benefit of the wife and children of the marriage, the lien was not destroyed by a proof of the debt by the trustees under the bankruptcy, but that the trustees had, notwithstanding the proof, a lien on the estate for the benefit of the wife and children of the bankrupt. Upon principle, and the authority of these decisions, I am of opinion that in the present case the proof of the debt of £850 by *John Tiercelin* did not extinguish it as against the residuary legatees; and that the Defendant, Mrs. *Elliott*, as the present

(1) 18 Ves. 290; 1 Rose, 96.
(2) 1 Gl. & J. 25.
(3) Buck, 351.
(4) 3 Mont. & A. 305.
(5) 4 Drew. 705,
(6) Buck, 115.

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legal personal representative of the testator, *Joseph Tiercelin*, is consequently entitled to retain the £223 19*s.* 1*d.* in part satisfaction of the bond debt of the bankrupt.

The Plaintiffs fail, therefore, as to the sum of £223 19*s.* 1*d.*, and succeed as to the four sums, amounting together to £1154 14*s.* 1*d.*; and I think the costs ought to be borne by the Plaintiffs and Defendants in proportion to those sums. In other words, the costs should be taxed, and paid out of the fund generally, and the residue divided in those proportions.

Solicitors for the Plaintiff: Messrs. *Lawrance, Plews, & Boyer.*
Solicitor for the Defendants: Mr. *Kennedy.*

In re BASTOW & CO.

V.-C. M.
1867
July 11.

Companies Act, 1862, *ss.* 85, 87, 163—*Creditors—Leave to enforce Execution after Petition to wind up.*

Creditors of a company issued a writ before the presentation of a petition for winding up. Execution was issued afterwards, but before the winding-up order was made:—

Held, that the Court had a discretion, under the 87th and 163rd sections of the *Companies Act*, 1862, and injunction refused to stay proceedings under the execution; but the creditors were put upon terms in regard to the description of property to be taken.

A COMPANY was incorporated in June, 1865, by the name of *Samuel Bastow & Co., Limited*, under the provisions of the *Companies Act*, 1862, the objects being for the purchasing and carrying on the ironworks belonging to *Samuel Bastow*, at *West Hartlepool*, and other works of a like nature. A Petition was presented by the company on the 27th of June, 1867, for winding up the company by the Court. Advertisements were issued on the 28th of June, and the order for winding up was made on the 6th of July.

Shortly before this time Messrs. *Fleming & Morrison* obtained payment of a bill of the company by proceeding to judgment and execution.

Another acceptance of the company, for ironstone supplied to them by Messrs. *Fleming & Morrison*, became due on the 15th of

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June, and on the 18th a writ was issued, on which judgment was signed on the 1st of July, for the sum of £952 19*s.* 3*d.*, and execution was issued on the 2nd of July; and on the same day the sheriff entered upon the ironworks, and levied upon the goods and property of the company, and was proceeding to sell as soon as the law would permit.

This was a motion on behalf of the company to make absolute an interim injunction granted on the 5th of July, to restrain Messrs. *Fleming & Morrison* from taking or continuing any further proceedings under the judgment and execution obtained by them against the company, and to restrain Messrs. *Fleming & Morrison*, and the sheriff of *Durham*, from selling any of the goods of the company which had been seized under the execution, until further order.

An affidavit had been made in support of the motion by the secretary of the company, to the effect that the principal property of the company consisted of the smelting works, and the goods and chattels upon and about the same, so taken in execution by the sheriff, and that it would seriously injure the works, and prejudice the interests of the other creditors, if the sale were proceeded with, since the works and property were already mortgaged to various parties for sums amounting to about £14,000, and the property and effects of the company would not be sufficient, after payment of the mortgage debts, to pay 10*s.* in the pound to the unsecured creditors, even if sold to the best advantage, and they could only be sold to the best advantage as a going concern. But if the goods and effects so seized in execution were permitted to be sold it was more than probable that the mortgagees would immediately proceed to enforce their securities, and thereby the unsecured creditors of the company would be greatly prejudiced. In a subsequent affidavit the secretary stated that if all the capital of the company was called up, there would be more than sufficient to pay 20*s.* in the pound.

Mr. *Baily*, Q.C., and Mr. *Speed*, in support of the motion:—

There now being an order for winding up this company the Court is empowered, under the 85th and 163rd sections of the Act 25 & 26 Vict. c. 89, to stop all proceedings against the company.

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By the 163rd section it is enacted, "that where any company is being wound up by the Court, any attachment, sequestration, distress, or execution, put in force against the estate or effects of the company after the commencement of the winding-up, shall be void to all intents and purposes." The 84th section declares that the winding up of a company shall be deemed to commence at the time of the presentation of the Petition, and the 85th section gives the Court power at any time after the presentation of the Petition and before the order for winding-up, upon the application of the company, to restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the Court thinks fit.

This Petition was presented on the 27th of June, and execution was issued on the 2nd of July. Under these circumstances the Court is bound to exercise its powers and grant an injunction to restrain any further proceedings under the execution.

Mr. *Roxburgh*, Q.C., and Mr. *Davey*, for Messrs. *Fleming & Morrison* :—

The writ under which it is now sought to stay execution was issued on the 18th of June, and although the Petition was presented on the 27th, no notice of such Petition was given to Messrs. *Fleming & Morrison* that anything was intended to be done until the 3rd of July. They allowed the action to proceed knowing that judgment would be due on the 30th of June. The advertisements, it is said, were inserted on the 28th, but this did not constitute notice; and the creditors state that they did not see the advertisements. There is nothing in the *Companies Act* of 1862, similar to the provisions in the *Bankruptcy Act*, that an advertisement in the *Gazette* shall be notice to all the world. Notice in the *Gazette* is simply for this purpose, that any person who is interested in the company may, if he likes, appear on the hearing of the Petition to oppose the order being made. It is notice for no other purpose. It is not analogous to a bankruptcy, since the company would be able to pay 20*s.* in the pound if all their capital was called up.

Then, with regard to the 163rd section of the Act, it has been decided that that section is to be read in conjunction with, and is

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controlled by, the 87th section, which provides that when an order has been made for winding up a company, no suit, action, or other proceeding, shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose. The 163rd section is not, therefore, an imperative enactment that an execution so levied shall be absolutely void, but the Court may give effect to the execution although it has been levied after the winding-up. That was the construction put on the statute by the Lords Justices in the case of the *Great Ship Company* (1); Lord Justice *Turner* considered that it was a case for the discretion of the Court. Then, in *In re London Cotton Company* (2), it was contended, as it has been here, that there were no words limiting the effect of the 163rd section; but Vice-Chancellor *Wood* held, that notwithstanding that section the Court had power, under the 87th section, where a winding-up order had been made, to give leave to a creditor to proceed with an execution. There are two other cases, in which a similar view has been taken, namely, *In re Exhall Mining Company* (3), and *In re Hill Pottery Company* (4).

If, then, the Court has power to allow the proceedings to continue against the company, this is a fit case for the exercise of its discretion, and it is a case in which the Messrs. *Fleming & Morrison* ought to be allowed the fruits of their diligence. They have seized nothing that can impede the sale or deteriorate the company's effects. They have only seized the pig-iron which has been made out of the ironstone supplied by Messrs. *Fleming & Morrison*. There has been no fraud or unfair proceeding on the part of these creditors, and the general principle of this Court is, that it will not interfere with the rights of creditors when they have been acquired by a fair exercise of diligence.

Mr. *Rigby*, for the Sheriff.

Mr. *Baily*, in reply:—

The cases cited, in which the Court has given leave to parties to go on after the winding-up, are cases in which there had been,

(1) 33 L. J. (Ch.) 245; 12 W. R. 139.
(2) Law Rep. 2 Eq. 53.
(3) 4 N. R. 127.
(4) Law Rep. 1 Eq. 649.

before the Petition was presented, first, judgment, and secondly, execution; and, in one case, the officer was actually taking proceedings under the distress. In *In re London Cotton Company* (1), the sheriff was not in possession before the winding-up, only because he had been barred out, and could not obtain possession under the writ. The plaintiff in the action had done everything he could do; he had placed the writ in the hands of the sheriff before the Petition was presented, and in all the cases where the Court has allowed the Plaintiff to go on, everything was done by the Plaintiff to complete the actual receipt of the money; and, therefore, to prevent him from continuing proceedings would have been to deprive him of the fruits of that which he had gained before the Petition was presented. Those cases in no way resemble the present, where there was not only no judgment recovered, but there was no right to any, before the Petition was presented. By the Act of Parliament, you cannot have judgment until twelve days have elapsed, consequently they had no right to judgment when the Petition was presented. They had only issued the writ, but they had no judgment, and no execution. They would, consequently, be deprived of nothing which they had at the time.

As regards notice, we have done all that the Act requires: we have issued advertisements, as we were bound to do, and it was the Plaintiffs' own fault to go on to execution, or even judgment, after that notice was issued. The utmost that can be said for the Plaintiffs is, that they have been allowed to proceed with their action by our neglect in not giving them notice; but that only affects the question to the extent of such costs as may have been incurred in that respect, and those costs the company are willing to give them. But as to the costs of this application, the Act is conclusive that no proceedings shall be taken after the Petition is presented.

SIR R. MALINS, V.C.:—

In this case the execution creditors, Messrs. *Fleming & Morrison*, being creditors of the company for ironstone supplied by them, of which the whole produce of the company, namely, iron, was produced, commenced an action, by the writ usually issued upon a bill of exchange, on the 18th of June, the bill having fallen

(1) Law Rep. 2 Eq. 53.

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due on the 15th. The action being undefended, they were entitled to obtain judgment and issue execution on the 1st of July. The writ was put into the hands of the sheriff on the 2nd of July, and the sheriff actually levied, and was in possession. The Petition to wind up the company was presented on the 27th of June, and the order to wind up was made on the 6th of July last. At the time, therefore, that the winding-up process commenced, there was nothing more than a pending writ in existence. At the time when the order to wind up was made, the execution creditor, by the sheriff, was actually in possession. Now, under these circumstances, the 163rd section enacts, "That where any company is being wound up by the Court, any attachment, sequestration, or distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up, shall be void to all intents and purposes."

The Act makes no distinction, therefore, whether the sheriff is or is not in possession at the time, but the execution is not to be put in force; therefore the injunction is equally applicable whether the sheriff has been in possession before the winding-up process commences, or whether he goes into possession after it has commenced, or before it is completed, because in neither case is the judgment to be put in execution; in other words, the property is not to be taken.

But then it has been decided, and decided by a Court which binds me, that that general enactment of the 163rd section must be read in connection with the 87th section, which enacts "That when an order has been made for winding up a company under this Act, no suit, action, or other proceeding, shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as it may think fit to impose. Now, it has been decided by the Lords Justices in *In re Great Ship Company* (1), that where the sheriff was actually in possession before the winding-up process commenced, it was not a case for the interference of the Court, but that the execution creditor should have all his remedies. In the case of *In re London Cotton Company* (2), a case which occurred afterwards, and was decided by Vice-Chancellor *Wood*, the same point arose. In that case the

(1) 33 L. J. (Ch.) 245; 12 W. R. 139. (2) Law Rep. 2 Eq. 53.

sheriff was not actually in possession, but he had been prevented taking possession by the debtor shutting the door against him. The decision, therefore, must be taken to have proceeded upon precisely the same ground as if the sheriff had been actually in possession. Consequently the decisions up to this time have proceeded upon the ground that the creditor obtained an actual possession under his execution, and had acquired very distinct rights before the winding-up process commenced. I suppose if there had been any other case in which this question has arisen it would have been cited, but this appears to have been the first case in which the Court has been applied to, to allow a creditor to put an execution in force where he has taken possession after the winding-up process has commenced. It is true the action was commenced before, but judgment was obtained afterwards. The writ was placed in the hands of the sheriff, who levied four days before the winding-up order was made, but many days after the presentation of the Petition. Now Lord Justice *Turner* in his judgment, in *In re Great Ship Company* (1)—and I always take his judgments to be safe guides—says: "The question is, what are the circumstances which ought to guide the Court in the exercise of its discretion? In my opinion the Court is bound to look at the legal rights of the parties, and to the interests, not of one class only, but of each particular class of creditors who may be affected by its decision. There is nothing in this Act to give to general creditors any rights to have their interests consulted in preference to the interests of particular creditors whose case comes before the Court. It is the duty of the Court to hold an even hand over the interests of all parties. I think the section was meant with the view to meet cases in which there might have been unfair proceedings on the part of creditors. Above all, the Court is bound, in considering the question as to the exercise of its discretion, to see what its duty would have been if the order to wind up had been actually made, and an application had been made by a creditor for leave to issue execution."

Now, one always feels the difficulty of cases which depend upon the mere exercise of discretion, and during a considerable part of the argument I was greatly impressed, and I have not wholly

(1) 33 L. J. (Ch.) 245; 12 W. R. 139.

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ceased to be so, with the great inconvenience of a section of an Act of Parliament so positive as the 163rd section, which is made to turn upon discretion. But it has been decided that it is entirely a matter of discretion; therefore, that imposes on me the obligation of exercising the discretion I am armed with to the best of my power in every case. Now, exercising a discretion in the present case, I find that the company, on its own application, that is, upon a Petition by itself, its directors and contributories, and not on the application of any creditor, has obtained an order to wind up, and that order to wind up no doubt was obtained as a matter of convenience to themselves, since they did not think fit to give notice to this creditor of their proceedings. I think there has been negligence on both sides. The circumstance of the creditors obtaining payment of a debt shortly before, by means of an execution, might have put them on their guard to look out for an application to wind up, but I cannot say that that is a negligence which can in any way affect their interest; but, on the other side, there was an obligation on this company to give notice to their creditors, who had commenced an action against them, of what they were doing, and that they omitted to do. The creditor being in entire ignorance of their proceedings, on the 2nd of July actually obtained possession of a sufficient amount of their property to satisfy his debt. Under these circumstances, ought the creditor to be deprived of the advantage he has obtained by his writ of execution? Giving the best consideration I can to the case (I should have reserved my judgment if I had thought it likely I could alter my opinion)—seeing that, after all, it is a matter of discretion, that there is no positive rule—that though I may exercise the discretion one way, another Judge or Court may come to an entirely opposite conclusion: and, under the particular circumstances here stated, I do not think any case is shewn by the company for interfering with the rights of the execution creditor. He is a fair and *bonâ fide* creditor who has acted in a fair and *bonâ fide* manner; he has obtained the advantage he has got by going into possession before the order for the winding-up was made, though the Petition was presented. He has got possession. It is stated that there will be enough to pay all in full ultimately; therefore, it is merely a question whether he is to be paid in full by virtue of his

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execution, or whether he is to wait until the completion of the winding-up process. Under all the circumstances, I think that no case is established against him, and I shall therefore refuse the motion. I should not have come to this conclusion but for the decisions which have been cited, and which are binding on me; but as those decisions leave it wholly a matter of discretion, I do not think it is a case in which I should interfere with the execution creditor, because, for the reasons I have stated, I think he is entitled to the execution he has obtained; but I do not intend to allow him to levy in such a manner as materially to deteriorate the property of the company, and, as I have power to impose such terms as I think fit, I impose upon him the terms that he shall not detach or interfere with the building, nor take away any castings or other property that can be used in contract work, but shall take nothing in execution but moveable property, and that moveable property I intend to limit to pig-iron only.

Solicitors for the Company: Messrs. *Meyrick, Gedge, & Loaden.*
Solicitor for the Creditors: Mr. *F. Kearsey.*
Solicitor for the Sheriff: Mr. *Crowdy.*

In re PLAS-YN-MHOWYS COAL COMPANY.

V.-C. M. 1867 Aug. 2.

Company—Winding-up—Judgment Creditor—Execution issued before Commencement of Winding-up.

At the time of the presentation of a Petition to wind up a company, the sheriff was in possession of the property of the company under executions issued at the suit of several judgment creditors. After the Petition was presented, the Court, upon the *ex parte* application of the Petitioner, restrained the sheriff from selling the property until after the hearing of the Petition; and after making an order for the compulsory winding-up, the Court ordered the sheriff to deliver up the property to the official liquidator, to be sold in the winding-up, reserving to the creditors the same priority against the proceeds of the sale as if it had been made by the sheriff.

12 Eq 195
13 Eq 316

In May, 1867, the sheriff of *Flintshire* took possession of the property of the *Plas-yn-Mhowys Coal, Cannel, and Ironstone Company, Limited*, a company registered under the *Companies Act*, 1862, under a writ of execution issued at the suit of *Edward*

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Hamblin; before the 12th of June writs of execution were issued at the suit of several other creditors.

On the 12th and 13th of June two Petitions were presented for the compulsory winding up of the company, and shortly afterwards one of the Petitioners obtained *ex parte* an *interim* injunction restraining the sheriff from selling the property, which was continued from time to time until the 11th of July, when the Petitioner renewed his application upon notice, and the motion was ordered to stand over until the 2nd of August, the injunction being continued. On the 29th of July the Petitions, which had stood over with a view to an arrangement, were heard, and a winding-up order was made, and an official liquidator was appointed.

Evidence was given, in support of the motion, that a forced sale of the property would seriously diminish the assets of the company.

Mr. *Glasse*, Q.C., and Mr. *A. E. Miller*, for the Petitioner, in support of the motion, asked that the sheriff might be ordered to give up the property to the official liquidator, reserving the rights of the execution creditors. It was for the interest of all parties that the property should be sold to the greatest advantage, which could only be done by the liquidator. Similar orders had been made in *In re Hill Pottery Company* (1), and *In re Leeswood Iron Company* (2).

Mr. *Cotton*, Q.C., and Mr. *Eddis*, for the other Petitioner, supported the motion.

Mr. *Martineau*, for one of the execution creditors, and Mr. *Freeling*, for another execution creditor, and for the Sheriff:—

The execution creditors having been in lawful possession before the commencement of the winding-up, ought to be allowed t reap the fruit of their diligence: *In re Great Ship Company* (3); *In re London Cotton Company* (4); *In re Bastow & Co.* (5). At all events, the order now made should declare their priority against the proceeds of the sale, and should fix a time within which the sale is to be made.

(1) Law Rep. 1 Eq. 649.
(2) M.R. 15 Nov. 1866.
(3) 33 L. J. (Ch.) 245; 12 W. R. 139.
(4) Law Rep. 2 Eq. 53.
(5) Law Rep. 4 Eq. 681.

SIR R. MALINS, V.C.:—

I shall make the same order as was made in the case of the *Leeswood Iron Company* (1). I do not think I can now decide anything as to the priorities of the creditors. They will retain the same rights (whatever they are) against the proceeds of the property seized by the sheriff on their behalf as they would have had if it had been sold by the sheriff.

Mr. *Freeling*:—The order should provide for the payment of the sheriff's poundage, as well as his other charges.

The VICE-CHANCELLOR:—You may insert the word if you think it necessary.

The form of the order was as follows:—"That the sheriff do give up to the official liquidator of the said company any property in the possession of the said sheriff under or by virtue of any execution on a judgment against the said company at the suit of the said [*naming the several execution creditors*], and that the said property be sold in the winding up of the said company, and that separate accounts be kept and taken of the proceeds of the property seized by the sheriff under the said writs; and it is ordered that the said several execution creditors do have the same priority against the proceeds of the property seized by the sheriff, when sold, as they would have had if it had been sold by the sheriff, without prejudice to their right as creditors in the winding-up, and that they be at liberty to apply in Chambers in the winding-up, if the sale be unreasonably delayed, and that the costs of all parties of this application, and the charges of the said sheriff properly payable, including his poundage, be taxed, and be paid out of the assets of the said company."

Solicitors: Messrs. *Rooks, Kenrick, & Crook*; Messrs. *Chester & Urquhart*; Messrs. *Emmets, Watson, & Emmet*; Messrs. *Simpson & Roberts*; Messrs. *Vizard, Crowder, Anstie, & Young.*

(1) M.R. 15 Nov. 1866.

V.-C. M. 1867 Aug. 5.

In re MARSEILLES EXTENSION RAILWAY AND LAND COMPANY.

Company—Voluntary Winding-up under Supervision—Power of Court to remove Liquidators—Companies Act, 1862, *ss.* 141, 150.

When a company is being wound up voluntarily under the supervision of the Court, the Court has a discretionary power to remove the liquidators appointed by the company without any proof of misconduct or unfitness on their part, if, having regard to all the circumstances, it is of opinion that their removal will conduce to the more efficient winding up of the company.

AT meetings of the *Marseilles Extension Railway and Land Company, Limited*, held on the 25th of March and the 9th of April, 1867, resolutions were duly passed and confirmed for the voluntary winding up of the company, and the appointment of Messrs. *Cooper*, *Kemp*, and *Astley*, as liquidators. On the 26th of April, 1867, an order was made for the continuation of the voluntary winding-up under the supervision of the Court.

On the 12th of July, 1867, at a meeting of the creditors of the company, held under the 149th section of the *Companies Act*, 1862, in the Chambers of the Vice-Chancellor, several of the creditors objected to the continuation of the liquidators, principally on the ground that they had been nominated by the shareholders, and proposed different persons for the office, and the matter was brought before the Vice-Chancellor, who proposed to remove the three liquidators, and appoint an independent person not nominated by any creditor or shareholder, and with that view obtained the consent of Mr. *Quilter* to accept the office; but as some of the contributories and creditors objected that the Court had no jurisdiction to remove the liquidators without some specific cause shewn, the Vice-Chancellor directed the matter to be adjourned into Court.

Mr. *Baily*, Q.C., Mr. *Glasse*, Q.C., Mr. *J. Napier Higgins*, Mr. *Fischer*, and Mr. *Locock Webb*, for creditors and contributories who objected to the removal of the liquidators:—

Under the 141st section of the *Companies Act*, 1862, the Court

cannot remove liquidators appointed by the company under a voluntary winding-up, except "on due cause shewn": *Lindley* on Partnership (1), and cases there cited. The 150th section only applies to the removal of liquidators appointed by the Court. No summons has been taken out for the removal of these liquidators, and there is no allegation of unfitness or misconduct on their part. The objection that they have been appointed by the shareholders would apply to every liquidator under a voluntary winding-up.

Mr. *Karslake*, Q.C., Mr. *Cottrell*, Mr. *Bagshawe*, and Mr. *F. Waller*, for other creditors:—

The Court has jurisdiction to remove the liquidators: *Ex parte Pulbrook* (2). The 141st section only applies to voluntary winding up not under supervision; but the 149th section expressly empowers the Court to have regard to the wishes of creditors in the appointment of liquidators, and in all other matters relating to the winding-up subject to supervision; and the 150th section empowers the Court to appoint and remove liquidators. It would be unreasonable that the power given by that section to remove liquidators should be confined to the additional liquidators appointed by the Court. Under the 151st section, the Court, after making an order for winding up subject to supervision, may exercise all the powers which it might exercise if the order had been for a compulsory winding-up. It may, therefore, exercise the power given by sect. 93 to remove liquidators. Neither the Act nor the General Orders require a summons to be taken out for the purpose, and if it is necessary that due cause should be shewn, the fact that a great number of creditors object to the liquidators appointed by the company is a sufficient cause for their removal.

Mr. *De Gex*, Q.C., and Mr. *Horton Smith*, for *Quilter*.

Mr. *Baily*, in reply:—

In *Ex parte Pulbrook*, cause was shewn for the removal of the liquidator, viz. that he was both a creditor and shareholder, and even in that case the Court of Appeal was divided in opinion as to the jurisdiction.

(1) Pages 1423–4, 2nd Ed. (2) 2 D. J. & S. 348.

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SIR R. MALINS, V.C.:—

I am of opinion that under the 141st section of the Act I have a discretionary power to remove the liquidators appointed by the company. The question is, what is meant by the words "on due cause shewn"? On one side it is contended that "due cause" must be something amounting to misconduct or personal unfitness; on the other side it is contended, and I think that the contention is borne out by the case of *Ex parte Pulbrook* (1), that the Court may take all the circumstances into consideration, and if it finds that it is, upon the whole, desirable that a liquidator should be removed, it may remove him. I do not feel much doubt that the latter is the true construction, and that I have the power to remove these gentlemen. I think that in these cases of winding-up the Court is in the same position as regards the company and the liquidators as the Commissioner in Bankruptcy as regards the estate of a bankrupt and his assignees, and it would be most inconvenient if the Court had not the power to remove any officer employed in the winding-up.

But then the question arises, whether I ought to exercise the power in this case. There is no personal objection alleged or proved against the liquidators; but I am satisfied that it is a serious and valid objection to their efficiency as liquidators, that a considerable number of the creditors are opposed to their continuance in office; just as in the case of an ordinary trust it is a serious obstacle to the performance of the trust if a large number of the *cestuis que trust* are dissatisfied with the trustees. Upon this ground, finding that there was no chance of the parties agreeing among themselves, I proposed to appoint Mr. *Quilter* as a perfectly unexceptionable person, whom nobody had nominated; but as it now appears that a large body of creditors and shareholders object to the removal of the liquidators appointed by the company, and I am not at all sure that I should satisfy any considerable number of creditors by appointing Mr. *Quilter*, I think, upon the whole, it will be the most expedient course to allow the present liquidators to continue, but to direct that they shall not allow any debt, or take any step in the winding-up, without applying to the Court, so that it may be in the strictest sense a winding-up under the supervision

(1) 2 D. J. & S. 348.

of the Court. The costs of all parties, including Mr. *Quilter*, must come out of the estate.

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Solicitors: Messrs. *Lewis, Munns, Nunn, & Longden;* Mr. *Hathaway;* Messrs. *G., S., & H. Brandon;* Messrs. *Vallance & Vallance;* Messrs. *Evans & Co.;* Messrs. *Tilleard, Son, Godden, & Holme.*

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V.-C. M. 1867 *July* 22, 23.

Joint Stock Companies Acts—Unregistered Company—Right to sue.

A trade partnership of more than twenty-five persons, formed before the passing of the 7 & 8 Vict. c. 110, and formally registered under the 58th section of that Act, but not otherwise registered, is not illegal, and a suit in equity may be instituted by some of the partners on behalf of themselves and all the others.

THIS was a demurrer.

The original bill was filed by the *Pudsey Union Waterloo Mill Company*, and ten shareholders or partners in the company, in whom its property was vested as trustees for the company, for an injunction to restrain the Defendants from polluting a stream of water, alleged to have been used by the company without interruption for forty years for the purpose of their business.

The bill alleged that in 1825 a number of cloth manufacturers formed themselves into a partnership or company, called the *Pudsey Union Waterloo Mill Company*, for the purpose of erecting and working a scribbling and fulling mill; that they erected and fitted up a mill, and had for the last forty years carried on the business of scribbling and fulling in the said mill; that shortly after the passing of the 7 & 8 Vict. c. 110, they caused themselves to be completely registered as a joint stock company under that Act, and thereby became incorporated; that the land and mills belonging to the company were vested in the other Plaintiffs as trustees for the company.

The cause having come on to be heard upon motion for decree, the Plaintiffs failed to prove that the company had been completely registered under the 7 & 8 Vict. c. 110, and the Defendants raised

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a preliminary objection, that the company could not sue in a corporate capacity. The Court allowed the objection, but gave the Plaintiffs leave to amend.

The bill was then amended by striking out the name of the company as Plaintiffs, and the allegation that the company had been completely registered and incorporated, and inserting allegations that, shortly after the passing of the 7 & 8 Vict. c. 110, they were formally registered as a joint stock company under that Act, but that they had never been otherwise registered; that the Plaintiffs to the amended bill were partners in the company; and that the partners or shareholders in the company exceeded fifty in number, and were too numerous to be made parties to the suit; and by making it a bill by the Plaintiffs on behalf of themselves and all the other partners in the company.

The Defendants demurred to the amended bill for want of equity.

Mr. *Glasse*, Q.C. (Mr. *Swanston* with him), in support of the demurrer:—

The company or partnership which the Plaintiffs represent, being a trading partnership consisting of more than twenty-five persons, and not being registered under any of the Joint Stock Companies Acts, is illegal, and incapable of suing, and this bill, which is in substance a bill by the partnership, cannot be maintained. By the 7 & 8 Vict. c. 110, s. 58, every trading partnership consisting of more than twenty-five members, which existed on the 1st of November, 1844, was required to be registered within three months from that day; the bill alleges that this company was formally registered shortly after the passing of the Act. "Shortly after" may or may not mean within the three months, and it must be assumed against the pleader that the registration was not within the three months, and consequently that the partnership became illegal. But even if it was duly registered under 7 & 8 Vict. c. 110, s. 58, it was made illegal by the *Joint Stock Companies Act*, 1856 (19 & 20 Vict. c. 47), s. 4, which expressly prohibited more than twenty persons from carrying on trade in partnership, unless registered as a company under that Act, and, having once ceased to exist legally, it was not made legal by the repeal of that

section by the *Joint Stock Companies Act*, 1857 (20 & 21 Vict. c. 14), s. 3. Moreover, it was by the 28th section of the latter Act, and is now by the 210th section of the *Companies Act*, 1862, made incapable of suing at law or in equity. It is clear that such a partnership, formed since the passing of the *Companies Act*, 1862, is illegal: *Harris* v. *Amery* (1).

Mr. *Baily*, Q.C., and Mr. *Wickens*, in support of the bill:—

This partnership, having been formed before the passing of any of the Joint Stock Companies Acts, is legal, and capable of suing as an ordinary partnership; and as its members are too numerous to be made parties, the bill is properly filed by some of them on behalf of themselves and all the others. It was unquestionably legal at the time of its formation, and the *onus* is upon the Defendants of shewing that there is some statutory provision now in force making it illegal or incapable of suing. The registration required by 7 & 8 Vict. c. 110, s. 58, was not for the purpose of incorporation, but a mere formal registration for the purpose of ascertaining the existence and number of these large partnerships, and the omission to register under that section within the specified time, though it would have subjected the partnership to a penalty, would not have affected its legality; however, upon the allegation in this bill it must be assumed that this partnership was formally registered in due time. The 4th section of the *Joint Stock Companies Act*, 1856, was not intended to apply to previously existing partnerships, and it was repealed in the following year. The only Act now in force affecting this question is the *Companies Act*, 1862, and it is immaterial whether at any time between 1844 and 1862 the partnership was or was not illegal, or incapable of suing. Of that Act, sect. 4 clearly applies only to subsequently formed partnerships, and sects. 209 and 210 apply exclusively to certain insurance companies, and to companies required by any Act thereby repealed to register under the Acts of 1856 and 1857; but this partnership, not being a company completely registered under 7 & 8 Vict. c. 110, was not required by any of the repealed Acts to register under the Acts of 1856 and 1857, or either of them, and is therefore not affected by those sections. The 210th section only precludes a company from

(1) Law Rep. 1 C. P. 148; 12 Jur. N.S. 165.

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suing in its corporate capacity, and has no application to suits by all the members individually, or by some of them on behalf of themselves and all the others, as clearly appears from the provision in the same section, that the company shall not be incapable of being made a Defendant, which must mean that it may be made a Defendant in its corporate capacity; moreover, the 210th section expressly enacts that default in registration shall not make the company illegal, or subject to any disability other than as specified in the section.

Mr. *Glasse*, in reply:—

The 58th section of 7 & 8 Vict. c. 110, by imposing a penalty for non-registration, impliedly makes an unregistered company illegal: *Taylor* v. *Crowland Gas and Coke Company* (1). The 4th section of the Act of 1856 required this company to be registered under that Act; it is, therefore, according to the 209th section of the *Companies Act*, 1862, a company required by an Act thereby repealed to register under the Joint Stock Companies Acts, and is, consequently, by the 210th section made incapable of suing. If the demurrer is not allowed the Court will not overrule it, but reserve it till the hearing of the cause.

Sir R. Malins, V.C., after stating the allegations contained in the original bill, and retained in the amended bill, continued:—

The cause came before me on motion for decree in May last, and the Defendants then objected that the company, who were co-Plaintiffs, were incapable of suing, because they were not completely registered; after argument, I acceded to that objection, and as no appeal has been made against my decision, I must assume it to have been correctly decided that the partnership or company was not in a situation to sue in a corporate capacity. I gave the Plaintiffs leave to amend, and in pursuance of that leave the bill has been amended by striking out the name of the company, and it is now made a bill by the Plaintiffs as partners and trustees of the partnership, and they sue on behalf of themselves and all other the partners of the company. The

(1) 10 Exch. 293; 18 Jur. 913.

bill contains an allegation that the partners or shareholders in the company exceed fifty in number. Upon this allegation, therefore, it is a bill in which every one of these partners is a Plaintiff; it being the settled rule of the Court, that a bill filed by one creditor, or by one partner on behalf of himself and all the other creditors or partners, makes every creditor or partner a Plaintiff to the bill. That being so, a very important question is raised, which I am surprised to find has not been decided long ago, namely, whether a partnership consisting of more than twenty-five persons, which existed before the *Joint Stock Companies Act* of 1844, and the Acts which followed it, is capable of suing in the names of the individual partners since the passing of those Acts. If the effect of those Acts is to incapacitate such a partnership, if not registered, from suing, the consequence would be, that this company, not having put itself in a situation to sue in its corporate capacity (as I have already decided), if it is incapable of suing in its individual capacity, would be without a right of suit at all, and its property might be destroyed, invaded, and taken away as anybody might think fit, and it would be absolutely without remedy. That is a conclusion to which I should reluctantly come, but to which I should come without hesitation if I found the Acts of Parliament were imperative.

I invited Mr. *Glasse* to point out to me in the Acts of Parliament that, which it appeared to me was necessary to be found there in order to incapacitate the Plaintiffs from suing, namely, a provision that all trading partnerships consisting of above the prescribed number were bound by these Acts to register, and that if they did not register they had thrown upon them the penal consequence of not being able to sue. I think, upon an examination of the statutes, it will be found that they contain no such provision. The first of these Joint Stock Companies Acts to which my attention has been called is the 7 & 8 Vict. c. 110, and the 4th section of that Act prescribes what is to be done in order to make a registered company within the Act; but the question more particularly depends upon the 58th section, which prescribes that with regard to all joint stock companies to which the Act is made to apply, and which shall exist on the 1st day of November, 1844, whether incorporated by Act of Parliament, or by charter, or privileged by

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letters-patent, or established by virtue of a deed of settlement, or of any other instrument, or by virtue of any authority whatever, or in any other way whatever, "that within three months from the said 1st day of November the directors, managers, officers, or others, having the direction, management, conduct, superintendence, or execution of the affairs of any such company, shall register such company at the office for the registration of joint stock companies, and for that purpose shall make, or cause to be made, a return of certain particulars. And that on such registration every such company shall be entitled to have a certificate of registration without paying any fee either for such registration or for such certificate, but such certificate shall be for the purpose of shewing that such company had registered, and shall not be considered as a certificate of complete registration, so as to confer on any such company the powers and privileges of the Act, and that if within the said period the persons hereby required to register any such company fail so to do, on conviction thereof every such company so failing shall forfeit for every such offence a sum not exceeding £50." I quite agree with the argument of Mr. *Glasse*, that when an Act of Parliament imposes a penalty for a thing being done, that does in fact make the thing done an illegal act. But it does not rest there, for these statutes have been amended from time to time, and we must go to the Act of 1856, which I agree, if it had not been altered, would look more like a prohibition, if not an actual prohibition, against more than twenty persons carrying on business at all without being registered; for the 4th section enacts that "not more than twenty persons shall, after the 3rd of November, 1856, carry on in partnership any trade or business having gain for its object, unless they are registered as a company under this Act, or are authorized so to carry on business by some private Act of Parliament, or by royal charter, or letters-patent, or are engaged in working mines within and subject to the jurisdiction of the Stannaries." That would clearly apply to the present company, for it does not come within the exception, and it is a company or partnership consisting of more than twenty persons; then the section prescribes that "if any person carry on business in partnership contrary to this provision every person so acting shall be severally liable for the

payment of the whole debts of the partnership, and may be sued for the same without the joinder in the action or suit of any other members of the partnership." If it had rested on this section alone, there might have been considerable difficulty in coming to the conclusion that this company can be considered as a legal company at all, but that is completely altered by the 3rd section of the 20 & 21 Vict. c. 14, the *Joint Stock Companies Act*, 1857, which is a complete substitute for the 4th section of the Act which I have just referred to. The 3rd section enacts that the 4th section of the former Act shall be repealed, "and in lieu thereof" (therefore it is a complete substitution) "be it enacted as follows: if after the passing of this Act more than twenty persons carry on in partnership any trade or business having for its object the procurement of gain to the partnership, then, unless such persons are included within one or more of the classes following, that is to say:—1. Are registered as a company under the principal Act; 2. Are a company incorporated or otherwise legally constituted by, or in pursuance of, some Act of Parliament, royal charter, or letters-patent; or 3. Are engaged in working mines within and subject to the jurisdiction of the Stannaries; each one of the persons so carrying on business in partnership together, contrary to this provision, shall be severally liable for the payment of the whole debts of the partnership, and may be sued for the same without the joinder in the action or suit of any other member of the partnership." Now, it appears to me from this section, that it must have been found that the 4th section of the previous Act had gone too far, that it had rendered illegal a great number of companies, because companies (not for any of the purposes here mentioned) in this country consisting of more than twenty members were very numerous, and I suppose it was found to be a very inconvenient enactment, and that it embarrassed these companies, and therefore, by way of amendment, this clause was substituted for it; the effect of which was, not to make it illegal for more than the prescribed number of persons to carry on business, but to impose on each member the liability of being sued individually and solely for the debts of the partnership; so that the public, instead of having to sue very numerous partners, which it became impossible to do, might fix upon any one

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member of the partnership, leaving him to seek his contributions from his co-partners as best he could.

Then Mr. *Glasse* relies upon the 28th section of this Act of 1857, which enacted, that if any company thereby required to register under the Joint Stock Companies Acts made default in registering on or before the 2nd day of November, 1857, then from and after such day, until the day on which such company was registered under the Joint Stock Companies Acts, 1856 and 1857, it should be incapable of suing, either at law or in equity, but should not be incapable of being made a Defendant to a suit, either at law or in equity. If, therefore, this had been a company required by the Act of 1857 to be registered, it would have followed that, not having registered, they would have been incapable of suing either at law or in equity. But is this a company required to be registered by the Act of 1857? The only clause which could apply to this company is the 3rd, and that clause does not require the company to be registered, but simply says, that if it is not registered the penal consequence to its members shall follow which I have pointed out. I therefore come to the conclusion that this is a company not required to be registered by the Act of 1857, and therefore the penal consequence of the 28th section, namely, the incapacity to sue, was not thrown upon it by that Act.

From that Act, downwards, nothing is relied upon but the *Companies Act*, 1862. Now, it is so clear to my mind that no company or partnership, not registered, consisting of more than the prescribed number, established since the passing of the Act of 1862, can be legal, that it could not have been on that point, I think, that the stress of the argument turned in *Harris* v. *Amery* (1), but it must have been on the ground, that the company there was not a partnership trading for profit; because the 4th section of the Act so distinctly prescribes that no company shall be legal unless registered, that the case did not admit of argument on that point.

But in the present case the question of the necessity of registration under the Act of 1862 depends upon the question, whether this company falls within the provisions of the 209th section, which is as follows:—"Every insurance company completely registered under the Act 7 & 8 Vict. c. 110, shall, on or before the 2nd day of

(1) Law Rep. 1 C. P. 148.

November, 1862, and every other company required by any Act hereby repealed to register under the said Joint Stock Companies Acts, or one of such Acts, and which has not so registered, shall, on or before the expiration of the thirty-first day from the commencement of this Act, register itself as a company under this Act." So that every company which by any of the Acts of 1844, 1856, and 1857 (for this Act repeals all those Acts), was required to register before the passing of this Act, must register within thirty-one days after the passing of this Act, or the penal consequences prescribed by the 210th section will follow. But I have already shewn, according to my view of the case, that this was a company which had certain penal consequences imposed upon it as to the right of the public to sue any individual member, but which was not required by the earlier Acts to be registered, in order to give it a right of suit. If I am right in that construction, it will follow that this company is excluded from the 209th section, and was not compellable or bound to register within thirty-one days, because it was not bound to register before. Then, if I am right in my construction of the 209th section, it will follow that none of the penal consequences fall on this company which are imposed by the 210th section, which provides, that if any company required by the last section to register under this Act makes default in complying with the provisions thereof, then from and after the day upon which such company is required to register under this Act, until the day on which such company is registered, the penal consequence is imposed upon such company that it shall be incapable of suing either at law or in equity, but shall not be incapable of being made a Defendant to a suit, either at law or in equity.

Upon these grounds, therefore, I come to the conclusion, that this being an old partnership, formed forty-two years ago, having had an existence of no less than nineteen years before the Act of 1844 was passed, and the Act of 1856, under which it would seem to have been necessary to register, having been repealed by the following Act of 1857, except for the short time while the Act of 1856 was in force, there was no obligation upon it to register, and that it is a company capable of suing in its individual capacity, and, therefore, if I had all the partners before me, I should hold that they had a right to maintain the suit. They are virtually before me,

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because, according to the practice of the Court, when the parties are so numerous that they cannot conveniently be put on the record, any one may sue on behalf of himself and the others, and such is the constitution of this suit. I therefore come to the conclusion, that I must overrule this demurrer. I am very glad I am able to do so, because, having already decided that they cannot sue in their corporate capacity, I should be reluctant to come to the conclusion that a company, having had duration for so long a period, and having, I suppose, carried on a considerable business, is actually without any remedy at law or in equity for the very serious wrong which, according to the allegations of this bill, which, for the purpose of this demurrer, I must assume to be true, though they may, of course, be all displaced by evidence, has been done to them, that is to say, the pollution of a pure stream of water which they have used for a great number of years, but which is of no use to them now through the acts of the Defendants.

There is one other point, namely, the allegation in the bill that shortly after the passing of the 7 & 8 Vict. c. 110, the company caused themselves to be formally registered as a joint stock company. I do not think that allegation shews that they registered themselves in such a manner as that they were able to sue in their corporate capacity. Mr. *Wickens* satisfied me that that registration did not enable them to sue in their corporate capacity. On all these grounds I must overrule the demurrer. I have no doubt that in a proper case it is the rule of this Court not to decide a demurrer upon argument, but to reserve it for the hearing of the cause, but I do not think this is a case calling for the application of that rule, and therefore I simply overrule the demurrer.

Solicitors for the Plaintiffs: Messrs. *Ridsdale & Craddock*, agents for Messrs. *Richardson & Turner, Leeds.*

Solicitors for the Defendants: Messrs. *Few & Co.*

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H. applied in writing for ten shares in a company, and the directors allotted to him ten shares; after the allotment, but before it was communicated to *H.*, he withdrew his application:—

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ACCUMULATIONS *by operation of Law—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98)—*Direction to invest Surplus.*] Direction that trustees should apply so much as necessary of the income of testator's residuary personal estate for the maintenance of his son (a lunatic) for life, and upon further trust to invest any surplus, and to treat it as part of testator's personal estate, which was given over after the son's death:—

Held, that the direction to invest the surplus was void beyond the period of twenty-one years from the testator's death, and that testator's next of kin were entitled to the accumulations.

But, *semble*, accumulations arising by operation of law are not within the *Thellusson Act*.

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ADEMPTION *by settlement of Annuity—Arrears—Double Portions.*] By will, made in 1824, *A.* gave all his real and personal estate to trustees upon trusts for conversion, and upon further trust after payment thereout of his debts, funeral and testamentary expenses, to divide the

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residue equally between such of his children as should be living at his death, and the issue of such of them as should have died in his lifetime.

Upon the marriage of his son, *B.*, in 1849 with *C.*, *A.*, by agreement of even date with the marriage settlement, agreed to pay the trustees of the settlement the yearly sum of £350 during the life of *B.*, and in case *C.* should survive *B.*, then to continue such yearly payment to the trustees of the settlement for the purposes thereof.

In 1865 *A.*, in pursuance of a family arrangement, transferred to his children, including *B.*, property in which he was jointly interested with them: *B.*'s gain under this arrangement being considerably more than the value of a perpetual annuity of £350 a year.

On the death of *A.* in 1865, the allowance to *B.* had been unpaid since 1859:—

Held, that the gift by will to *B.* of a share in *A.*'s residuary estate was adeemed *pro tanto* by the provision of £350 per annum made for him in the agreement of June, 1849, but that *B.* was entitled to payment, as a creditor of the estate, of the arrears of such allowance accrued due in *A.*'s lifetime.

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2. ADEMPTION *by Gift notwithstanding Promise of further Gift.*] Testator, by will, dated April, 1864, bequeathed £500 to his daughter in case she should marry, and directed that the same should be paid to her on the day of her marriage, or as soon after as conveniently might be. The daughter married in September, 1864, and in the November following the testator gave the husband £400 towards the expenses of furnishing. He afterwards promised a further sum of £600, but died before carrying out this promise:—

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ADJUSTMENT OF ACCOUNTS *between Tenant for Life and Remainderman—Income of Legacies until Payment—Income of Contingent Legacies.*] Where a testator has bequeathed legacies, and given his residue to a tenant for life, with remainder over; executors, though, as between themselves and the persons interested in the residue, they are at liberty to have recourse to any funds they please in order to pay debts and legacies, yet will be treated by the Court, in adjusting the accounts between tenant for life and remainderman, as having paid the debts and legacies not out of capital only, nor out of income only, but with such portion of the capital as, together with the income of that portion for one year, was sufficient for the purpose.

Testator *A.*, having bequeathed legacies, which his estate was amply sufficient to pay, gave the residue of his estate to *B.* absolutely. *B.* died within six months after the death of *A.*, having by his will bequeathed legacies, and given the residue of his estate to a tenant for life, with remainder over. *B.*'s personal estate, other than that bequeathed to him by *A.*, was insignificant in amount:—

Held, that whatever remained of *A.*'s estate, after taking such portion of the capital as, together with the income of such portion for one year, was required to pay *A.*'s debts and legacies, became the property of *B.*; and that the tenant for life was entitled from the death of *B.* to the income of the residue of *B.*'s estate, after deducting such portion of the capital as, together with the income of such portion for one year, was required to pay *B.*'s debts and legacies:

Held, further, that he was entitled to the income of such portion of *B.*'s residue as was in a proper state of investment, *in specie*; and as

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to the rest, of so much consols as would have been produced by conversion at *B.*'s death.

B. gave some legacies to legatees, contingent on their attaining twenty-one:—

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ADVANCEMENT—*Setting-up in Business—Married Daughter—Payment of Husband's Debts—Liability of Trustees—Costs.*] If after the institution of an administration suit trustees take upon themselves to make advances, the Court will require the clearest evidence that the discretion has been exercised *bonâ fide*, and after the most mature investigation; and will impose upon the trustees the expense of such proof.

The Court being of opinion that the Defendants, the trustees, had not *bonâ fide*, but for the purpose of defeating the interest of the Plaintiffs, exercised their power, directed the amount of such advances to be restored and brought into Court, and the costs occasioned by their misconduct to be paid by the trustees.

A power of advancement for setting-up sons and daughters in business will not entitle trustees to make advances for such a purpose to a married daughter; nor for the purpose of paying the debts of a daughter's husband.

TALBOT *v.* MARSHFIELD 661

ADVANCES *within the Statute of Distributions.*] Any sum of considerable amount paid out of the common fund of a family, to or for the benefit of a child, is an "advance" within the meaning of the *Statute of Distributions;* the intention of the statute being to make the provision for all the children equal.

A premium paid upon the occasion of a son being articled to an attorney and solicitor *held* an advance to the son, though the profession was afterwards relinquished.

A sum paid for the purchase of a commission in the army for a son *held* an advance; but whether the sum paid for the outfit of a son on entering the army is an advance, *quære?*

Sums paid by a father to a son to enable him to pay debts of honour, the non-payment of which would have compelled him to leave the army, *held* advances.

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AFFIDAVIT OF NO SETTLEMENT *dispensed with—Fund in Court—Payment out of small Sum—Married Woman.*] In paying out of Court a fund divisible into shares of less than £10 each, to some of which married women were entitled, the Court dispensed with affidavits of no settlement.

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AMALGAMATION *under Power in Articles — Company "of a like Nature."*] By one of the articles of association of a company registered under the *Companies Act*, 1862, it was provided that the directors might, with the consent of an extraordinary general meeting, "transfer and sell the business of the company, or purchase, or amalgamate with, the business of any other company of a like nature":—

Held, that the above words, even if they authorized the directors, with the consent of an extraordinary general meeting, to dispose of all the assets of the company, were not sufficient to empower the directors, with such consent, to compel a dissentient shareholder to become a member in a new company with more extended objects, nor (*semble*) in any new company at all.

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ANNUITY, PAYABLE OUT OF INCOME.] A testator directed his trustees to convert and invest the whole of his estate, and with and out of the annual proceeds to levy and raise the annual sum of £100, and to pay the same to *A. S.* for life, and "from and after the payment," and "subject thereto," to pay the income of the trust funds in thirds to the persons named in the will for life, and to divide the principal amongst their children. The income of the fund was insufficient for the payment of the annuity in full:—

Held, that the annuity was not payable out of the *corpus*, and that the income only must be paid to the annuitant during her life.

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APPORTIONMENT OF RENT—*Lands Clauses Act, s.* 119—*Railway Company — Specific Performance — Leaseholds — Lessor's License.*] Where a railway company serves a notice, under the *Lands Clauses Act*, on a lessee to take land held under a lease containing a proviso against assignment without the license of the lessor, the necessity for such license is taken away by the operation of the Act.

Where a portion of the land comprised in a lease is taken by a railway company, the lessee is not bound, under sect. 119 of the *Lands Clauses Act*, to procure the lessor's consent to the agreement with the company for the apportionment of the rent.

Specific performance decreed against a company by whom leasehold land had been so taken under a notice, where the lessor's license to the assignment and consent to the apportionment of rent had not been obtained.

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ARBITRATION, *when a Bar to suit—Agreement to make Submission a Rule of Court—Appointment of Arbitrators—Common Law Procedure Act—Jurisdiction of Superior Court—Amendment of Plea—*

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Practice.].. An agreement to submit the affairs of a partnership to arbitration, and that the submission shall be made a rule of a Court of common law, cannot be pleaded in bar to a suit in equity, seeking discovery, complaining of the Plaintiff being sued in actions, and praying for a receiver; although before the bill was filed arbitrators were appointed, and since bill filed, the submission has been made a rule of the Court.

The jurisdiction of the superior Courts in such a case is not ousted by the provisions of the *Common Law Procedure Act.*

If the agreement to submit also contains a covenant not to take proceedings at law or in equity, whether in that case the submission may be pleaded in bar of proceedings in any superior Court, except that before which the reference is pending, *quære.*

Observations on *Dimsdale* v. *Robertson* (2 J. & Lat. 58).

Where, in a reference under the *Arbitration Act* of Will. 3, an award has been made, the jurisdiction in the matters of the award of every superior Court, except that before which the reference is pending, is excluded.

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BEQUEST OF RESIDUE *to Five as Tenants in Common—Bequest as to One, revoked, and Legacy substituted.*] A testator, by his will, gave his residuary real and personal estate to trustees upon trust for his "five sons," *A.*, *B.*, *C.*, *D.*, and *E.*, as tenants in common, and by a codicil "revoked and made void all the trusts, powers, provisoes, directions, clauses, matters, and things in his will contained, concerning his residuary estate, so far as the same trusts, &c. related to or affected his son *E.*, or his right, interest, or claim thereto or therein," and "in lieu thereof" he gave £15,000 to the trustees upon trust for *E.*, his wife and children, and if *E.* should have no children, he directed that "the said legacy" should sink into his residuary estate, but so that *E.* or his representatives should not take any share or interest therein:—

Held, that the testator died intestate as to the trusts of one-fifth share of his residuary estate, and that the legacy of £15,000 was not payable out of such share, but was payable before the residue was ascertained.

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BREACH OF TRUST—*Assignment of Claim for.*] Tenant for life of a trust estate mortgaged it, and it was sold by the mortgagee. After the sale, the purchaser and mortgagee, for a nominal consideration, assigned to the tenant for life certain alleged arrears of interest and profits of part of the trust fund, which, as the Plaintiff alleged, the trustees had made in excess of the interest for which they had accounted. A bill filed against the trustees, on the title conferred by this assignment, for an account of their profits, was dismissed with costs.
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CANAL—*Right to adjacent Support for—Mines—Minerals—Compensation.*] By a Canal Act the mines and minerals within and under the land through which the canal was to be made were reserved to the owners of the land, and the owners were empowered (subject to the restrictions thereinafter contained) to work and get such mines and minerals, not thereby injuring the navigation or the works; by subsequent sections the owners of mines were prohibited from getting minerals under or within ten yards from the canal without the consent of the proprietors of the canal, who, if they refused to permit the owner of any mines to work such part thereof as should be under or within ten yards from the canal, were required to compensate such owner in the manner provided by the Act:—
Held, that the provisions of the Act as to prohibition of working and compensation extended by implication to workings more than ten yards from the canal, and that the proprietors of the canal were not entitled, by virtue of their common law right to adjacent support, to prevent the lessee of an adjacent quarry, who derived his title from the person who had sold to the proprietors the land on which the canal was made, from working more than ten yards from the canal so

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as to endanger the safety of the canal, without paying him compensation in the same manner as if the quarry had been within the ten yards; but that, upon paying such compensation, they were entitled to stop the working of any mine which would be injurious to the canal:—

Held, also, that the reservation of mines and minerals within and under the land included everything below the surface available for agricultural purposes, which could be made useful for any purpose, and included the right of quarrying as well as underground mining.

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CHAMPERTY, *Party to, not disqualified from suing—Solicitor—Costs—Compensation for wrongfully working a Coal Mine.*] The Plaintiff agreed with a solicitor to give him a portion of the profits arising from the successful prosecution of a suit to establish his right to certain coal mines, upon being indemnified against the costs of the proceedings:—

Held, that the contract amounted to champerty and maintenance, but the Plaintiff was not disqualified from suing, since his title was vested in him before he entered into the illegal contract. A decree was therefore made in his favour, but without costs.

If, however, the solicitor had been the party suing by virtue of a title derived under such a contract, his bill would have been dismissed.

In assessing compensation for coal already gotten by the Defendant, the Court, being of opinion that he had worked it inadvertently, and not fraudulently, *held* that he was to pay only the fair value of such coal, as if he had purchased the mine from the Plaintiff.

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CHARGE *of Money due on Bond—Penalty.*] Testator having charged the share of a residuary legatee with money due on the security of bonds, and all interest thereon:—

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CHARITY WHICH HAS CEASED, *Legacy to—Mortmain—Ascertainment of Residue, after providing for illegal Object—Cy-près.*] Testatrix gave the capital of £1000 consols to the rector and churchwardens of a parish and their successors, upon trust to apply such of the dividends thereof as should "from time to time be necessary or required, in keeping in repair" her family grave; and to pay and divide "the residue of the said dividends," at Christmas every year for ever, amongst the aged poor of the parish:—

Held, that though the amount of gift for the repair of the grave was

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not specified, the Court could, if necessary, have estimated the amount "necessary and required" for the purpose; and so have prevented the gift of the residue from being void for uncertainty.

Observations on *Chapman* v. *Brown* (6 Ves. 404).

Held, further, that as there was a prior gift of the whole fund to the rector and churchwardens, the gift to the poor did not fail by reason of its being a bequest of a residue after a void bequest; and that there was a good gift of the whole to the charity, discharged from the obligation to repair the grave.

Testatrix gave a legacy to a charitable institution, which was dissolved in her lifetime:—

Held, that the legacy lapsed, and fell into the residue, and could not be applied *cy près*.

FISK *v.* ATTORNEY-GENERAL 521

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See RESIDUE.

COLLATERAL RELATIVES—*Volunteers*—13 *Eliz. c.* 5.—*Voluntary Settlement.*] A lady being indebted to the Plaintiff at the time of marriage, settled all her real and personal property (with the exception of jewels and furniture exceeding in value the amount of her debt), upon failure of issue of the marriage, in favour of certain collateral relatives, including a niece whom she had adopted as her daughter.

The lady survived her husband, and died without issue, leaving no assets:—

Held, that the settlement, so far as it was made in favour of collaterals, was voluntary, and must be set aside to the extent of the Plaintiff's debt.

SMITH *v.* CHERRILL 390

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See CANAL.

COMPOSITION DEED—Omission of debt from schedule 566
See OMISSION OF DEBT.

COMPROMISE—*Apportionment between Capital and Income—Administration—Claim against Estate of Testator.*] A claim made against the estate of a testator was compromised by the payment of a large sum several years after the testator's death:—

Held, that the amount due for principal and interest at the testator's death must be treated as a debt due from his estate, and the *corpus* thereof reduced by that amount; and that any benefit gained to the estate by the compromise must, as between the persons entitled to the *corpus* and income thereof, be apportioned in the ratio of the amount due from the testator at the day of his death, to the further amount calculated to have been due from his estate at the time when the compromise was effected.

MACLAREN *v.* STAINTON 448

————, Production of documents as to 254
See PRODUCTION OF DOCUMENTS.

CONSENT OF WIFE *to transfer—Declaration of Trust—Revocation of Consent before Transfer.*] The consent of a married woman had been given before Commissioners, for the transfer and payment to her husband of sums of stock and cash standing in Court to her separate account:—

Held, that this did not amount to a declaration of trust, and that it was competent to her at any time before the transfer had been completed, to retract her consent.

PENFOLD *v.* MOULD 562

CONSOLIDATED ORDER XXXVIII. rule 2—Scale of costs 352
See SCALE OF COSTS.

CONSOLIDATION OF MORTGAGES—*Form of Foreclosure Decree—Practice.*] In a suit by a mortgagee for foreclosure, a purchaser of an equity of redemption from the mortgagor will not be permitted to redeem his estate without also redeeming all other mortgages by the same mortgagor which have become united in the Plaintiff, whether such union has taken place before or since the purchase; and whether the purchaser may or may not have had notice of the

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existence of the other mortgages: and there is no difference in this respect between the position of a purchaser for value and that of a mortgagee of an equity of redemption.

Observations on *White* v. *Hillacre* (3 Y. & C. Ex. 597).

Where mortgages of different properties by the same mortgagor have been consolidated by a mortgagee, and the mortgagor has conveyed the equity of redemption in some of the properties to purchasers by deeds of various dates, upon foreclosure by the mortgagee, a first right of redeeming all the mortgages will be given to the first purchaser of part in point of date, with successive rights of redemption, in default, to the subsequent purchasers of other parts in order of date, as in the case of first, second, and third mortgagees.

Secus, where the owners of the equity of redemption, though of different priorities as to the period of their enjoyment, come in under the same instrument; as, for example, tenant for life and remainderman under a settlement.

Observations on *Edwards* v. *Martin* (28 L. J. (Ch.) 49).

BEEVOR *v.* LUCK. BEEVOR *v.* LAWSON 537

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——————— Paid-up shares allotted to subscriber of memorandum. 238
See SUBSCRIBER OF MEMORANDUM.

CONVERSION *in favour of Charity*—9 *Geo.* 2, *c.* 36—*Mortmain—Impure Personalty.*] *A.*, being entitled to moneys charged upon land, but primarily secured by bond and promissory notes, bequeathed all her property to her three daughters, *B.*, *C.*, and *D.*, whom she appointed executrixes of her will.

B. died in the lifetime of *A.*, and *C.* died intestate shortly after *A.'s* death, and *D.* became sole executrix of *A.*, and alone entitled to the said moneys. The moneys were not called in during the life of *D.*, who, by her will, gave legacies to charities:—

Held, that as *D.* was alone entitled to the property, the Court would not assume in favour of the charities a conversion into pure personalty, which she was not bound to make.

Shadbolt v. *Thornton* (17 Sim. 49; more fully reported in 13 Jur. 597) disapproved.

LUCAS *v.* JONES 73

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See COURT ROLLS.

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COSTS OF FIRST MORTGAGEE—Satisfied out of deposit on order for sale 156
See DEPOSIT ON ORDER FOR SALE.

COSTS OF WINDING-UP PETITIONER—*No Set-off of Calls against.*] Where a winding-up order has been made on the Petition of a shareholder who is afterwards made a contributory, he is entitled to the costs of the Petition and order, though a debtor to the company in respect of calls, without having the amount of such calls set off against the costs.
In re GENERAL EXCHANGE BANK 138

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See TRUSTS, CONSTRUCTIVE.

COURT ROLLS, *Production of—Suit by Copyhold Tenant—Customary Fees of Steward of Manor.*] A copyhold tenant, in a suit against the lord of the manor, is entitled to the usual order for the production of documents, including the court rolls, without payment to the steward of the customary fees.
HOARE *v.* WILSON 1

COVENANT NOT TO SUE—When a bar to suit 77
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CUSTOM, Meaning of word "descent" in 216
See "DESCENT."

CY-PRÈS—Legacy to charity which has ceased 521
See CHARITY WHICH HAS CEASED.

——— as to foreign charity 655
See FOREIGN CHARITY.

CY-PRÈS DOCTRINE, *Extent of—Will—Gift in Trust for Devisees for their Lives and their Issue for their Lives for ever—Estate Tail—Cy-près.*] Devise in trust for *A.* for life, with remainder in trust for *B.*, *C.*, and *D.*, and the survivor, for their lives and the life of the survivor, and for the issue of them respectively for their lives for ever, as tenants in common, with a gift over on their death without issue, or in case of the death of all their issue; and a direction that the before-stated entails to *B.*, *C.*, and *D.*, and their respective issues, were to be equally divided amongst the daughters as well as the sons of them and their issue:—
Held, that *B.*, *C.*, and *D.* took equitable estates in remainder for

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their lives and the life of the survivor, with cross-remainders between them, and that, on the death of the survivor, all the children of *B.*, *C.*, and *D.* took equitable estates as tenants in common in tail, with cross-remainders between them in tail.

The doctrine of *cy-près*, established by *Humberston* v. *Humberston* (1 P. Wms. 332), is applicable to such a devise, and not merely to a will of an executory character.

PARFITT *v.* HEMBER 443

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DAUGHTERS, Settlement on, under direction to settle strictly 122
See GIFT TO DAUGHTERS.

DEATH after seven years, presumption of 416
See PRESUMPTION OF DEATH.

DEATH "WITHOUT LEAVING," *read "without having had," a Child.*] Testator devised certain specific real estate to trustees and their heirs upon trust for his daughter *R.* for life, and after her decease he gave the same unto and equally between all and every her children, if more than one, as tenants in common, their heirs and assigns; and if but one such child, to his or her heirs and assigns; and in case his daughter should depart this life under twenty-one, or afterwards, "without leaving any child or children," testator gave the same hereditaments and premises to his son *C.*, his heirs and assigns:—

Held, that the children of *R.* took at their births indefeasible interests in fee, in remainder expectant on the death of their mother.

WHITE *v.* HILL 265

DEBENTURES *of Company under Companies Act*, 1862—*Winding-up—First Charge—Bills of Sale Act—Costs.*] The directors of a company registered under the Act of 1862, being empowered by their articles to borrow on debenture bonds any sums "necessary" for the business of the company, in December, 1865, issued twenty debentures of £100 each, all in the same form, by which they pledged "the property belonging to us for the time being during the subsistence of the debenture, with all the buildings and stock on, and connected with, our said property, and all the receipts and revenues to arise therefrom;" and declared that the entire debenture loan and interest should be a first charge on "our undertaking and property, and receipts and revenues aforesaid." The business of the company was to buy and sell land, to build, buy, and sell houses, to furnish houses for hotels, and to carry on the business of hotel keepers. A winding-up order having been made, the liquidator proceeded to sell certain freehold and leasehold estate belonging to the company; but the purchaser refused to complete unless the debenture holders were satisfied. The debenture holders thereupon took out a summons in Chambers:—

Held, that the effect of the debentures was to give the holders a charge, in priority to other creditors, upon the land and other property of the company:—

Held, further, upon the construction of the debentures, that they did not include the capital of the company, and that the issuing of them did not necessarily paralyse the business of the company, and was not, on that account, a transaction *ultrà vires*, or a breach of trust:

Held, further, that the non-registration of the debentures under the *Bills of Sale Act* did not render them void, as to the furniture and chattels, against the liquidator; though the winding-up was originally voluntary, continued under supervision:

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Held, further, that after making all just allowances to the liquidator in realizing the fund, the debenture holders, applying by way of summons in the matter of the winding-up, were entitled to their costs, as well as to their principal and interest, out of the fund, in priority to all other charges.
In re MARINE MANSIONS COMPANY 601

DEBT BARRED BY STATUTE—*Payment to prejudice of Devisees.*] An executor may, in the exercise of his discretion, pay a debt barred by the *Statute of Limitations*, notwithstanding that the personal estate of the testator is insufficient; and he will be allowed the payment as against the devisees of real estate, upon which other debts are in consequence thrown.
LOWIS *v.* RUMNEY 451

DEBTS, Payment of, when an advance 305
See ADVANCES.

———, Payment of husband's, not advancement to wife 661
See ADVANCEMENT.

DECEASED SHAREHOLDER, liability of devisees of 123
See OFFICIAL LIQUIDATOR.

DECLARATION OF FUTURE RIGHT—*Jurisdiction—Practice—Right of Renewal—Railway Company—Lands Clauses Act.*] Land, as to which a dispute as to the amount of the lessee's interest was pending (viz. whether he had a right of renewal for sixty-one years from 1885, or whether his interest expired altogether at the end of his existing term of sixty-one years, 1890), was taken by a railway company, under an agreement by which it was provided that if the lessee should substantiate his right of renewal, the company would pay him a further sum (the amount, if in dispute, to be settled by arbitration pursuant to the *Lands Clauses Act*), in addition to the price of the existing term. The company having since bought up the lessor's reversion in fee, the lessee filed a bill against them, praying a declaration of his right to a renewal from 1885, and payment of compensation on that footing.
Held, on demurrer, that the Court had jurisdiction to decide this question of future right of renewal, on which the lessee's claim to compensation for the land which had been taken out and out wholly depended, and for ascertaining which no means were afforded by the *Lands Clauses Act*.
BOGG *v.* MIDLAND RAILWAY COMPANY 310

DECLARATION OF TRUST—None by wife's consent to transfer .. 562
See CONSENT OF WIFE.

DEEDS—Neglect to obtain 397
See PRIORITY FROM NEGLIGENCE.

DELINQUENT DIRECTOR—*Companies Act*, 1862, s. 165—*Practice.*] Under sect. 165 of the *Companies Act*, 1862, no order will be made to compel a director or officer of a company to refund any moneys he has misapplied or retained, unless the case against such director or officer be clearly and distinctly made out, and there is no question of law to be determined.
In re ROYAL HOTEL COMPANY OF GREAT YARMOUTH 244

DEMONSTRATIVE LEGACY—*Gift to Children and Issue of deceased Children equally to be divided between such Children and Issue—Tenancy in Common.*] A testatrix appointed her real and personal estate to trustees upon trust to sell part thereof, and hold the proceeds

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and all the trust moneys and personal estate upon trust to pay the legacies thereinafter given, and after payment thereof, to pay an annuity to *P.* for life, unless he should become entitled to the legacy thereinafter mentioned, and, subject thereto, in trust for *H.* for life; and after her death, in trust to sell the estates not already sold, and out of the proceeds to pay to *P.*, his executors, administrators, and assigns, the sum of £20,000 in lieu of the annuity, and hold the residue in trust for all the children of *G.* who should be then living, and the issue of such of the children of *G.* as should be then dead leaving issue, equally to be divided between such children and issue, but so that the issue of such children should take only such share as their respective parents, if living, would have been entitled to.

P. died in the lifetime of *H.*, and on the death of *H.* the real estate remaining unsold was insufficient to raise the sum of £20,000:—

Held, that the sum of £20,000 was a demonstrative legacy, and payable out of the general estate to *P.*'s representative:

Held, also, that the issue of deceased children of *G.* took shares in the residue as tenants in common, and not as joint tenants.

The case of *Fream* v. *Dowling* (20 Beav. 624), as varied on appeal, commented on.

HODGES *v.* GRANT 140

DEPOSIT OF BILL OF LADING—*Transfer for Value—Property in Goods—Dishonour of Acceptance—Custom of Merchants.*] *A.* having ordered goods from *B.*, a firm at *Calcutta*, through *C.*, their agent in this country, received an invoice of the goods, with a notice that *B.* had drawn upon him for the price at six months.

On calling at *C.*'s office, *A.* was met by *C.*'s messenger, who handed to him for his acceptance the bill of exchange drawn upon him in respect of the goods, and the bill of lading, which was pinned to the bill of exchange. *A.* accepted the bill of exchange, and afterwards deposited the bill of lading with *E.* as a security for an advance, together with a policy of insurance upon the goods effected by himself in his own name, *C.* having declined to part with the original policy on the ground that it included other goods besides those purchased by *A.*

A. having become bankrupt, and unable to take up his acceptance, the goods were claimed by *B.* and *C.*, on the ground that the bill of lading had been improperly pledged, having come into *A.*'s hands irregularly, and without their knowledge, and contrary to an alleged custom amongst *East India* merchants not to part with the bill of lading of goods until the vendee has taken up his acceptances on account thereof:—

Held, that the alleged custom of trade was merely exceptional (as observed by *Crompton*, J., in *Gurney* v. *Behrend* (3 E. & B. 622, 630), and was not established by the evidence as being the usual course of business; and that the title of *E.*, as *bonâ fide* assignee for value, must prevail over any claim by the unpaid vendors.

COVENTRY *v.* GLADSTONE 493

DEPOSIT OF DEEDS—Priority—Neglect to obtain deeds 397
See PRIORITY FROM NEGLIGENCE.

DEPOSIT ON ORDER FOR SALE *at Request of Second Mortgagee—15 & 16 Vict. c. 86, s. 48—Abortive Sale—Application of Deposit.*] The money paid into Court by a second mortgagee in order to obtain an order for sale under the Act 15 & 16 Vict. c. 86, s. 48, held to be applicable to indemnify the first mortgagee for his costs in an abortive attempt to sell.

CORSELLIS *v.* PATMAN 156

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"DESCENT," *Meaning of, in Copyhold Custom*—3 & 4 *Will.* 4, *c.* 106, *s.* 3.] Where the custom of a manor was stated in a presentment of the homage to be that copyholds for the first *descent* after a surrender descend to the eldest son, and, if no surrender, to the youngest son:—

Held, that the word "descent" was not used in its strict legal sense, but meant "a single step in the scale of genealogy."

Where, therefore, the last surrender had been made to *B. B.*, who devised to *J. L. B.*, his heir according to the custom of the manor, and *J. L. B.* died intestate, leaving two sons:—

Held, that the youngest son of *J. L. B.* was entitled to succeed him.

Whether the *Inheritance Act* (3 & 4 Will. 4, c. 106) s. 3, applies to the case of a devise to an heir who disclaims all interest under the will, and enters as heir of the testator, *quære*.

BICKLEY *v.* BICKLEY 216

DEVISE OF FREEHOLD PROPERTY *held to include a Leasehold Interest.*] Testator devised to *A.* and *B.*, and their heirs, all his "freehold land, messuages or tenements, and hereditaments, respectively situate and being in, or forming the whole or part of" a set of buildings which he named, all in a particular parish. Of one part of the property thus described the testator at his death was seised in fee, subject to a lease; of a second part he was possessed for a term of years; and of (*X.*) a third part (now in question) he was possessed for a term of years, and he was also seised of the reversion of the same in fee from the expiration of three years after the end of the term:—

Held, that both the leasehold and the freehold interest of the testator in the portion (*X.*), passed under the above bequest.

MATHEWS *v.* MATHEWS 278

DEVISEES, Payment of statute-barred debt, as against 451
See DEBT BARRED BY STATUTE.

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DISTRIBUTIONS, STATUTE OF—Advances within 305
See ADVANCES.

DIVIDENDS, WHETHER INCOME OR CORPUS—*Debitum in præsenti, solvendum in futuro—Will.*] In June, 1865, a dividend of 7 per cent. per annum upon certain shares held by the testatrix was declared payable on the 15th of July, 1865, and the 15th of January, 1866. Testatrix died on the 31st of December, 1865:—

Held, that the January dividend formed part of the *corpus* of her residuary estate, and did not pass under a bequest of the annual income of such residuary personal estate.

DE GENDRE *v.* KENT 283

DIVORCE, Effect of, on wife's reversionary interest 162
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DOCUMENTS OF MANOR, Production of 1
See COURT ROLLS.

DOUBLE PORTION—Younger son becoming eldest 48
See YOUNGER SON BECOMING ELDEST.

DOUBLE PORTIONS—Annuity under settlement 504
See ADEMPTION. 1.

"ELDEST SON" *parting with Estate—Clause of Exclusion—Period of ascertaining Class.*] Upon the marriage of *A.*, who was tenant for life of *X.* estate, with remainder to his first and other sons in tail male, with *B.*, personal estate was settled upon the children of the marriage other than and except an eldest, second, or only son, for the time being entitled to *X.* estate, or the principal part thereof, for an estate in tail male in possession or remainder immediately expectant on *A.*'s death.

After attaining twenty-one, *C.*, the eldest son of the marriage, and then entitled to an estate tail in remainder immediately expectant on the death of his father, in *X.* estate, joined with *A.* in barring the entail and re-settling the estate by deed, under the limitations of which he obtained for himself a rent-charge of £500 a year during *A.*'s life and an estate for life in remainder, with remainder to his issue in tail general, and remainders over:—

Held, that the death of *A.*, at which time *C.* was tenant for life only of *X.* estate, was the period for ascertaining whether *C.* was to be excluded from the personal estate, and that accordingly he was entitled to share in it; the circumstance that his change of position had arisen from his own act not having the effect of excluding him.

STANHOPE *v.* COLLINGWOOD 286

————————, Younger son becoming—Double provision 48
See YOUNGER SON BECOMING ELDEST.

ELECTION, Heir not put to 407
See SCOTCH SETTLEMENT.

ELECTION BETWEEN SUIT AND ACTION—*Damages—Cairns' Act* (21 & 22 *Vict. c.* 27)—*Practice—Jurisdiction.*] *A.* filed a bill against *B.* for the cancellation of bills of exchange, drawn by *B.* and accepted by *A.* in part performance of a contract, of which *B.* failed to perform his part, and for an injunction to restrain *B.* from parting with or suing on the bills; and, pending the suit, *A.* commenced an action against *B.* for damages for breach of the contract:—

Held, that the suit and action were not for the same matter, and an order to elect obtained by *B.* was discharged.

Lord Cairns' Act (21 & 22 Vict. c. 27) does not diminish the rights of suitors; therefore a Plaintiff in equity, who would before the Act have been allowed at the same time to sue the Defendant at law for damages, may still do so, although he might, under the Act, pray for and obtain damages in the suit.

ANGLO-DANUBIAN COMPANY *v.* ROGERSON 3

EQUITABLE INTEREST—Form of notice of assignment 222
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EQUITY OF REDEMPTION—Division of—Form of decree 537
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ESTATE TAIL—Implied *cy-près* 443
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————————, Gift to *A.* and *B.* and their children 180
See WILD'S CASE, RULE IN.

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EXAMINATION *under Companies Act*, 1862, *s.* 115—*Attendance of Counsel and Solicitor — Re-examination — Notes of Proceedings.*] Where a person is examined at the instance of the official liquidator under s. 115 of the *Companies Act*, 1862, his counsel and solicitor are entitled to be present at the examination, to examine the deponent when the examination on behalf of the official liquidator is concluded, and to take notes of the proceedings.

In re BREECH-LOADING ARMOURY COMPANY. *In re* MERCHANTS' COMPANY 453

EXECUTION AFTER PETITION TO WIND UP — *Companies Act*, 1862, *ss.* 85, 87, 163.] Creditors of a company issued a writ before the presentation of a petition for winding up. Execution was issued afterwards, but before the winding-up order was made:—

Held, that the Court had a discretion, under the 87th and 163rd sections of the *Companies Act*, 1862, and injunction refused to stay proceedings under the execution; but the creditors were put upon terms in regard to the description of property to be taken.

In re BASTOW & Co. 681

EXECUTION ISSUED BEFORE WINDING-UP—*Order as to Sale—Injunction.*] At the time of the presentation of a Petition to wind up a company, the sheriff was in possession of the property of the company under executions issued at the suit of several judgment creditors. After the Petition was presented, the Court, upon the *ex parte* application of the Petitioner, restrained the sheriff from selling the property until after the hearing of the Petition; and after making an order for the compulsory winding-up, the Court ordered the sheriff to deliver up the property to the official liquidator, to be sold in the winding-up, reserving to the creditors the same priority against the proceeds of the sale as if it had been made by the sheriff.

In re PLAS-YN-MHOWYS COAL COMPANY 689

EXECUTOR—Payment of statute-barred debt as against devisees .. 451
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EXONERATION of Scotch estate from heritable bond by charge of debts 407
See SCOTCH SETTLEMENT.

EX PARTE WARING (19 Ves. 345), Limits of doctrine of 226
See SECURITIES FOR BILL OF EXCHANGE.

FACTORS' ACTS (6 *Geo.* 4, *c.* 94, *and* 5 *&* 6 *Vict. c.* 39)—*Pledge by Factor—Antecedent Debts—Advances.*] The *Factors' Act* (5 & 6 Vict. c. 39) does not apply to pledges for antecedent liabilities (whether they may or may not have ripened into debts), where no actual advance is made at the time of the pledge. Therefore where *H.*, a factor, pledged goods of his principal to *G.*; first, to secure the payment of an acceptance of *H.* in *G.*'s hands, not then due, which had been given to protect *G.*'s liability on a contract as *H.*'s broker; secondly, to repay to *G.* his loss on a resale of goods which *G.* had purchased for *H.* in his own name:—

Held, that the transaction was not protected by the *Factors' Act* (5 & 6 Vict. c. 39), and, *semble*, that both liabilities were antecedent debts.

Jewan v. *Whitworth* (Law Rep. 2 Eq. 692) explained.

MACNEE *v.* GORST 315

FAILURE of proviso for deduction from residuary share 40
See RESIDUE.

FEES OF STEWARD not payable for production in suit 1
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FIXED YEARLY SALARY TO SOLICITOR—*Solicitor and Client—Costs—Agreement.*] An agreement between a client and a solicitor that the solicitor shall be paid a fixed yearly salary, to be clear of all expenses of his office, and to include all emoluments, he paying to the client any surplus which may arise of receipts over payments, is not opposed to the provisions of the Attorneys and Solicitors Acts, nor to the policy of the law, where it is also a term of the agreement that the solicitor is not to transact professional business for any other client.

If a client and his solicitor were to agree that the solicitor should be paid a fixed salary, and should receive no costs beyond disbursements—whether an adverse party in a suit, on being ordered to pay costs, could be compelled to pay the client any costs beyond the solicitor's disbursements—*quære.*

GALLOWAY *v.* CORPORATION OF LONDON 90

FORECLOSURE—Form of decree as against partial purchaser 537
See CONSOLIDATION OF MORTGAGES.

FOREIGN CHARITY—*Cy-près Doctrine—Disclaimer by Trustees.*] A testator gave certain funds to the President and Vice-President of the *United States*, and the governor of *Pennsylvania*, upon trust to build and endow a college for the instruction of youth in the state of *Pennsylvania*, and directed that Moral Philosophy should be taught therein, and a professor should be engaged to inculcate and advocate the natural rights of the black people, of every clime and country, until they be restored to an equality of rights with their white brethren throughout the Union. The trustees disclaimed the gift:—

Held, that the Court, having no power to enforce the trust, nor to settle a trust for the administration of the charity *cy-près*, the object had failed, and the funds fell into the residue.

NEW *v.* BONAKER 655

FOREIGN COURT—*Proceedings in—Mortgage of a Ship—Consignment to New Orleans—Law of Louisiana—Rights of Creditors and Mortgagees—Comity of Nations.*] The owner of a British ship, having mortgaged it in *England*, employed a *Liverpool* firm to consign it to their agents at *New Orleans*. As the *New Orleans* firm happened to be creditors of the owner, the *Liverpool* firm, in consideration of their having the consignment, instructed their agents not to proceed against the ship at *New Orleans*, but to remit the proceeds to the mortgagees. Afterwards, the *Liverpool* firm getting into difficulties, some of the mortgagees insisted on the consignment being changed, and the *Liverpool* firm withdrew their instructions. When the ship arrived, the *New Orleans* firm brought actions in their Courts against the owner; and, as the Courts of *Louisiana* do not recognise the rights of mortgagees without possession, writs of attachment were obtained, under which the ship was seized. The mortgagees then, to prevent the ship being sold, gave to the *New Orleans* firm bonds for the amounts to be recovered in the actions, upon which the ship was released.

The mortgagees filed this bill to restrain the holders of the bonds from suing on them, and to have the bonds delivered up:—

Held, on demurrer, that the Court had no jurisdiction to stay proceedings on the bonds; first, because this Court would not have restrained execution of the attachment at *New Orleans*, as it could not have placed all the creditors, foreign and domestic, on an equal footing; secondly, because, if it could have done so, the mortgagees should have sought to restrain the attachment, and not have placed themselves in a worse position by giving the bonds; and, thirdly, because, if the prayer were granted, the Courts of *New Orleans* would never, in future, release an English ship on the bond of a mortgagee.

LIVERPOOL MARINE CREDIT COMPANY *v.* HUNTER 62

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FOREIGN LAW, Plea of penalty under 327
See PENALTY UNDER FOREIGN LAW.

FORFEITED SHARES, *Past holder of—Winding-up—Contributory—Unpaid Calls—Present and past Members.*] The articles of association of a company provided that the forfeiture of a share should involve the extinction of all interest in, and all claims against, the company in respect of the shares; but that any member whose shares had been forfeited should be liable to pay to the company all calls owing on such shares at the time of such forfeiture:—

Held, that the former owner of forfeited shares could not be placed on the list of contributories as a present member, in respect of the calls owing on his shares at the time of forfeiture.

No person can be settled on the list of contributories as a past member until it has been actually ascertained that the present members are unable to satisfy the contributions required to be made by them.

In re BLAKELY ORDNANCE COMPANY. NEEDHAM'S CASE .. 135

FORFEITURE by foreign law 327
See PENALTY UNDER FOREIGN LAW.

———— of shares, when valid 233
See QUORUM OF DIRECTORS.

FORFEITURE BY MARRIAGE *under Clause against Alienation—Acceleration of Remainder.*] A testator appointed, under a general power, real estate, and devised other real estate to his wife for life, and from and immediately after her death, to his son, with a proviso that if his wife should "do, make, or execute any deed, matter, or thing, whereby she should be deprived of the rents and profits, or the power or right to receive, or the control over the same, so that her receipt alone should not at all times be a sufficient discharge for the same, her life estate should cease and determine as fully and effectually as it would by her actual decease." The widow married again, without making any settlement:—

Held, that her life estate ceased upon her marriage, and the remainder, both in the appointed and devised estates, was accelerated.

CRAVEN *v.* BRADY 209

FREEHOLD, Leasehold interest passing by devise of 278
See DEVISE OF FREEHOLD PROPERTY.

GIFT TO DAUGHTERS "*to be settled upon themselves strictly*"—*Executory Directions—Form of Settlement.*] Where a testator directed that his daughters' shares under his will should be "settled upon themselves strictly":—

Held, that the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her for life for her separate use, without power of anticipation; and if she died first, then her share should go as she should by will appoint, and in default of appointment to her next of kin, exclusively of her husband; and if she survived, then to her absolutely.

LOCH *v.* BAGLEY 122

GIFT TO HEIRS AND ASSIGNS, read next of kin 171
See HEIRS AND ASSIGNS.

HEIR not put to election 407
See SCOTCH SETTLEMENT.

HEIR DISCLAIMING, Effect of devise to 216
See "DESCENT."

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HEIRS AND ASSIGNS *of a deceased Person, Gift of Personalty to—Next of Kin.*] Testator, after giving several sevenths of his personal estate to his living brothers and sisters "and their heirs and assigns" respectively, proceeded to give another seventh as follows:—"To the heirs and assigns for ever of my late sister *D.*, now deceased":—

Held, that the persons entitled to this last-mentioned seventh were the next of kin of *D.* at her death, according to the Statutes of Distribution.

In re NEWTON'S TRUSTS 171

HERITABLE BOND, Exoneration from, by charge of debts 407
See SCOTCH SETTLEMENT.

HOTCHPOT—Failure of proviso for deduction from share 40
See RESIDUE.

HOUSE AND FURNITURE—Gift to *A.* and *B.* and their children .. 180
See WILD'S CASE, RULE IN.

HUSBAND AND WIFE—Consent of wife to transfer not a declaration of trust 562
See CONSENT OF WIFE.

————————, Rights as to redeemed land tax—Mortgage by husband 549
See LAND TAX.

————————, Reversionary interest after divorce 162
See REVERSIONARY INTEREST.

IGNORANCE of purchaser of shares a defence 572
See SHARES—CUSTOM OF STOCK EXCHANGE.

IMPLICATION, Life estate by 475
See LIFE ESTATE BY IMPLICATION.

IMPURE PERSONALTY—Conversion in favour of charity 73
See CONVERSION.

INCLOSURE ACT, *Construction of—Mines—Right to Vertical Support—Custom to let down Surface void.*] Although the 32nd section of the general *Inclosure Act* (41 Geo. 3, c. 109) provides that every allotment set out and sold to pay the expenses of any local Inclosure Act shall be absolutely discharged of and from all common and other rights thereon or therein, and be vested in fee simple in the purchaser thereof, and be held in severalty as his private and absolute property; yet where a local Inclosure Act (in which the general Act was incorporated), after reciting that the lord of the manor was entitled to the soil of the wastes, and all mines and minerals thereunder, directed allotments to be sold to defray the expenses of the Act, and also directed certain parts of the wastes to be allotted to the lord as a compensation for his interest in the soil, and reserved to him all the mines and minerals under the lands directed to be divided and inclosed (except such as were devoted to public purposes):—

Held, that the reservation of mines to the lord extended to the allotments sold, as well as to those allotted to the tenants of the manor:

Held also, that the local Inclosure Act had placed the purchaser of the land so sold to pay expenses, and the lord of the manor, in the ordinary position of one being the owner in fee of the surface and the other the owner of the minerals, with rights of user of the surface for the purpose of working the mines; but that the lord had no right to cause a subsidence of the surface, even although he could not work the mines at all without causing such subsidence, and injunction accordingly.

A custom as between the owner of the surface and the owner of the

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mines entitling the latter to cause a subsidence of the surface, if necessary in working his mines, would be bad and wholly void.
WAKEFIELD *v.* DUKE OF BUCCLEUCH 613

INCLOSURE ACTS—Reservation of mines 613
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See ANNUITY PAYABLE OUT OF INCOME.

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INCOME AND CORPUS—Discrimination of 295
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See COMPROMISE.

INHERITANCE ACT—Devise to heir who disclaims 216
See "DESCENT."

INJUNCTION against trespass by stranger 174
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INSOLVENCY, Securities for bill when not available for winding up company without proof of 226
See SECURITIES FOR BILL OF EXCHANGE.

INTENTION, Modification of referential bequest by 98
See REFERENTIAL BEQUEST.

INTEREST ON CALL IN WINDING-UP—*Notice to pay Interest under* 3 *&* 4 *Will.* 4, *c.* 42, *s.* 28.] A notice of a call on a contributory under a voluntary winding-up under the supervision of the Court, stated that if the call was not paid at the time appointed, interest would be charged thereon at the rate of 5 per cent. The articles provided for interest on calls:—

Held, that the notice that interest would be charged came within the 28th section of 3 & 4 Will. 4, c. 42; and the Court ordered the contributory to pay the call with interest thereon up to the date of payment.
In rè OVEREND, GURNEY, AND CO. *Ex parte* LINTOTT 184

2. ———————————— *Order of November*, 1862, *Rule* 26.—*Companies Act*, 1862, ss. 102, 170.] Where a company is wound up under the *Companies Act*, 1862, and calls have been made on the shareholders, interest after the date of the winding-up can be paid out of the calls only on those debts which carry interest at law.

Interest was not allowed on the notes of a banking company where the notes were payable on demand, and no demand for payment had been made before the company was ordered to be wound up.

The 26th rule of the Order of November, 1862, is *ultrà vires* and invalid.
In re HEREFORDSHIRE BANKING COMPANY 250

INTESTACY by revocation as to share of residue 200
See BEQUEST OF RESIDUE.

IRREPARABLE INJURY, Injunction against trespass by stranger in case of 174
See TRESPASS.

JEWELS, *Settlement of—Married Woman—Trust, in default of Appointment by writing, for "her sole and absolute Disposal"—Gift by Manual Delivery.*] Under a settlement certain jewels were assigned upon

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trust for such person as *G.* (a married woman) should by writing direct or appoint, and in default of such appointment, upon trust for her during her life for her separate use, and to be at her absolute disposal, and her receipt, or that of the person to whom she should direct the jewels to be delivered, to be a good discharge. *G.*, without any direction in writing, delivered the jewels as an absolute gift to *V.*, who retained them in her possession. After the death of *G.* the question arose as to the validity of the gift to *V.*:—

Held, that *G.* had power to dispose of her whole interest in the jewels without any direction in writing, and that under the gift and manual delivery *V.* was absolutely entitled to them.

FARINGTON *v.* PARKER 116

JOINT STOCK COMPANIES ACT—Legality of unregistered company 695
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See FOREIGN CHARITY.

——————— to restrain proceedings on bonds given in Louisiana .. 62
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——————— as to order in Bankruptcy of 22nd May, 1862 566
See OMISSION OF DEBT.

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KNOWLEDGE, Casual, of trustee, not notice 222
See NOTICE TO TRUSTEE.

LAND TAX—*Marriage of Female Proprietor—Registration of Marriage by Husband—Mortgage by Husband—Reservation of Equity of Redemption to Husband—Right of surviving Wife to redeem*—38 *Geo.* 3, *c.* 60, *s.* 78.] Land tax having been redeemed, was bequeathed by will to a married woman. Afterwards the husband, having registered his marriage in the Land Tax Office in the manner required by the 78th section of the 38 Geo. 3, c. 60, mortgaged the land tax in the form of assignment which is prescribed by the Act; he (by a deed of even date) covenanting to pay the mortgage debt, and reserving the equity of redemption to himself alone. The wife survived:—

Held, that the husband of a proprietor of land tax, upon registering the marriage under the Act, acquires an absolute power of disposition over it:

Held, further, that as the husband in this instance had disposed of the land tax only to the extent of the mortgage debt, the right of the surviving wife to the property, subject to payment of the debt, was not alienated.

PIGOTT *v.* PIGOTT 549

LANDS CLAUSES ACT, s. 119—Lessor's License—Apportionment .. 112
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LEGACIES, Contingent—Intermediate income of 295
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LEGACY—Adeemed by gift, notwithstanding promise of further gift .. 517
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——— Demonstrative 140
See DEMONSTRATIVE LEGACY.

——— Charged on land an interest in land under Mortmain Act .. 106
See MINING ROYALTY.

LEGACY, RESIDUARY OR SPECIFIC—*Abatement.*] A testator bequeathed the money to be received under a policy of assurance on his life, which, at the date of the bequest, would have amounted to £6416, to trustees upon trust to invest it in Government securities, and pay the income to his wife for life; and, after her death, to pay thereout two sums of £2000, which he had agreed to settle on his daughters; and he gave £1000, part of the residue of the money, to *A.*; £1000 to *B.*; and "£416, residue and remainder of the moneys to be received under the said policy, after payment of the said four several sums of £2000, £2000, £1000, and £1000, with any future additions that may be made on the said policy," to *C.* £6532 was received under the policy, and invested in Reduced 3 per Cents., at 94. At the death of the widow the price of the stock had fallen to 89:—

Held, that the legacy to *C.* was a specific legacy of £532; and, consequently, that the legacies to *A.*, *B.*, and *C.*, must abate rateably.

WALPOLE *v.* APTHORP 37

LEGAL PERSONAL REPRESENTATIVE, Retainer by, after proof in bankruptcy 675
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LEGATEES, Pecuniary and residuary—Abatement for loss of assets .. 382
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LESSOR'S LICENSE on sale of leaseholds to railway company 112
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LICENSE OF LESSOR on sale of freeholds to railway company .. 112
See APPORTIONMENT OF RENT.

LIFE ESTATE BY IMPLICATION. Testator, after giving an annuity and legacies to his wife, and an annuity to his father for his life and that of his (testator's) mother, left several legacies which he wished to be paid duty free after the death of his father and mother; after his wife's death he directed the remainder of his property to be equally divided among his brothers and sisters, if living; if dead, among his nephews and nieces:—

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Held, that the widow took a life estate by implication in the residue.

HUMPHREYS *v.* HUMPHREYS 475

LIGHT FOR SPECIAL PURPOSE—*Prescription—Ancient Light.*] In order to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to an ancient window, open, uninterrupted, and known enjoyment of such light in the manner in which it is at present enjoyed and claimed must be shewn for a period of twenty years.

LANFRANCHI *v.* MACKENZIE 421

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LORD OF MANOR—Custom as to mines 613
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LOSS OF ASSETS *after Appropriation—Pecuniary and Residuary Legatees—Abatement.*] A testator, by his will, dated in 1829, gave £2300 bank annuities to trustees upon trust to pay so much of his debts as his ready money should be insufficient to satisfy, and to invest the residue and pay the interest to his wife for life; and after her decease to pay seven different legacies amounting to £1075, and to pay the residue to *A. B.* absolutely. The testator died in 1832, and the estate was completely administered and wound up, and no part being required for debts, the £2300 was set apart and appropriated as trust funds, and transferred into the names of the trustees upon the trusts of the will. Both trustees died, and the administrator of the survivor got possession of the funds and misappropriated the greater part, so that only £716 was forthcoming. The widow died in 1862:—

Held, that there having been a complete appropriation of the fund awaiting only the period of distribution, and there being no deficiency of assets, the pecuniary legatees must abate *pari passu* with the residuary legatee, each being entitled to the proportion they would have had if the whole amount had been forthcoming.

BAKER *v.* FARMER 382

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———————, Revocation of consent to transfer by 562
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———————— Power to dispose of settled jewels 116
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———————— Title to reversionary interest after divorce 162
See REVERSIONARY INTEREST.

MARSHALLING *as between past and present Members—Companies Act*, 1862, *s.* 38—*Winding-up—Contributories—Liability of past Members.*] The principles on which, under s. 38 of the *Companies Act*, 1862, the liability of the transferors of shares in a limited company within a year of the commencement of the winding-up is to be ascertained and enforced, and the mode in which the amount for which such transferors may be liable is to be applied in payment of the debts of the companies, considered.
In re BARNED'S BANKING COMPANY. ANDREWS' CASE 458

MEASURE OF COMPENSATION for wrongful mining 432
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MINES—Right under Canal Act to support 19
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MINING ROYALTY *not an interest in Land under Mortmain Act—Statute of Mortmain* (9 *Geo.* 2, *c.* 36, *s.* 3)—*Gift for Charitable Uses—Legacy charged on Land—Arrears of Rent.*] A legacy charged on land is an interest in land within the *Statute of Mortmain*, s. 3, and cannot while it remains unpaid be bequeathed for charitable uses by the legatee.
A testatrix demised the minerals under certain lands in consideration of a surface rent, and of a sum of £5039 1*s.* 3*d.*, to be paid by half-yearly instalments, at the rate of £750 per acre for such part of the minerals as should be gotten by the lessees, until the whole sum was completely paid, with powers of distress and re-entry in default of payment. At the death of the testatrix one instalment was due and unpaid:—
Held, that it was in the nature of rent, and passed under a residuary bequest in favour of charities.
BROOK *v.* BADLEY 106

MISREPRESENTATION IN PROSPECTUS—*Rectification of Register—Fraud—Variance between Prospectus and Articles.*] By the prospectus of a freehold land and brickmaking company, issued in October, 1865, by the promoter and certain directors who had been induced to join in the project of starting the company by a bonus of £100 each, and the promise of £600 a-year remuneration money, it was announced that the capital was to be £25,000 in 5000 shares; that a dividend of 15 per cent. had been guaranteed for five years; that a freehold estate had been purchased for £6250; that one-half the required capital had been sub-

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scribed by the directors and their friends; and that *A.*, the land proprietor, had taken 500 shares. In the same prospectus were embodied reports of surveyors, which spoke of the land as the "property" and the "estate" of *A.* By the memorandum of association, registered on the 21st of November, 1865, the objects of the company were given as more extensive than those announced in the prospectus. By the articles of association it was stated that the company was established for the purpose of purchasing a particular piece of land for £6250, and that the directors were to pay the promoter, as a reimbursement for all costs, charges, and expenses of every kind, £1500. The facts were that no guarantee other than a verbal guarantee by the promoter was ever entered into; that in September and October, 1865, the promoter contracted with *A.* for the purchase from him of the land described in the prospectus and articles for £1500, of which £500 was to be paid in shares; and then verbally agreed with the directors to resell it to them for £6250; that the directors took only twenty shares each, and that the whole of the shares subscribed for did not amount to one-half of the capital.

Plaintiff having, on the 7th of November, 1865, applied for 100 shares, and paid £100 for deposit, £100 for allotment, and two calls of £100 each, filed the bill in October, 1866, against the company, the directors, and the promoter, seeking to have his name removed from the list, and to have the moneys returned, on the ground of fraudulent misrepresentation and suppression of facts. A petition for winding up the company, which had paid one quarterly dividend only, was presented in September, 1866, and a winding-up order was made in November following:—

Held, that the Plaintiff was not entitled to relief on the ground of failure of the promised guarantee, he having made no inquiry into its nature or existence; but that he was entitled to relief on the ground of the misrepresentations as to the amount of subscribed capital, and as to the purchase-money: and his name was ordered to be removed from the list of members, together with an account of receipts and payments, and repayment of the balance to him, with costs, against all the Defendants.

It is not open to a shareholder who has taken a dividend to complain that the objects of the company, as stated in the articles, are more extensive than those stated in the prospectus.

Observations on the framing of a prospectus.

KENT *v.* FREEHOLD LAND AND BRICKMAKING COMPANY 588

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MORTGAGE OF SHIP—Creditors' suit in Louisiana 62
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NEAREST OF KIN—Next personal representative 359
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NEXT OF KIN taking under gift to heirs and assigns 171
See HEIRS AND ASSIGNS.

——————— Next personal representative 359
See NEXT PERSONAL REPRESENTATIVE.

NEXT PERSONAL REPRESENTATIVE—*Construction of.*] A testator gave £2000 in trust for his daughter for life, with remainder to her children; and, if she should die without issue, then "to the next personal representatives" of the daughter so dying as aforesaid.

The daughter died without issue, leaving a husband, a brother and sister, and a niece surviving:—

Held, that the brother and sister, as the nearest of kin, were entitled as joint tenants.

STOCKDALE *v.* NICHOLSON 359

NOTICE to pay interest on calls 184, 250
See INTEREST ON CALL IN WINDING-UP. 1, 2.

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NOTICE TO TRUSTEE, *Form of—Equitable Interest—Assignment—Priority.*] Upon an assignment of an interest in a trust fund, it is the duty of the assignee to give notice of the assignment to the trustee; and the only notice available in law is formal notice given by the person intending to claim the benefit of it, or by an agent on his behalf.

Where, therefore, a trustee became aware of the insolvency of his *cestui que trust* by reading in a newspaper an advertisement of a petition in the Insolvency Court, and he believed and acted on the information so acquired:—

Held, nevertheless, that a person who had taken a mortgage of the *cestui que trust's* interest, subsequently to the insolvency, was entitled to priority over the assignee in insolvency, by reason of his having been the first to give formal notice to the trustee.

LLOYD *v.* BANKS 222

OFFICIAL LIQUIDATOR, *Suit by, under Companies Act*, 1862, *s.* 95—*Company registered under* 7 *Geo* 4, *c.* 46—*Sanction of Court—Liability of Devisees of deceased Shareholder to Calls.*] A testator, who died in 1855, was a shareholder in a banking company registered under 7 Geo. 4, c. 46, and had executed the deed of settlement, under which he had, for himself and his heirs, covenanted to perform the articles. The deed provided that the representative of a deceased proprietor might either sell the shares, or become a proprietor in respect of them, and have them transferred into his own name, in which case he

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should execute the deed, and on his neglecting to do so for three months after notice given to him, the directors might forfeit the shares.

The testator, by his will, appointed *K.* his executor, and bequeathed to him his residuary personal estate, including his shares, and gave his real estate to him and to other devisees.

K. did not sell the shares, which remained in the testator's name; he took no steps to become proprietor, and the dividends were paid to him as executor. In 1864 the company was ordered to be wound up under the *Companies Act*, 1862, and *K.* was made a contributory. The official liquidator filed a bill on behalf of himself, and all other creditors of the testator, against *K.* and the devisees, for the administion of the testator's estate, and to enforce the calls against the real estate:—

Held, that the suit was properly instituted by the official liquidator under s. 95 of the *Companies Act*, by the general authority given by the Court, without any special order:

Held, also, that, notwithstanding the lapse of time since the testator's death, the real estate in the hands of the devisees was liable to the payment of the calls.

TURQUAND *v.* KIRBY 123

OMISSION OF DEBT *from Schedule when it avoids Composition Deed—Bankruptcy Act*, 1861, *s.* 192—*Reasonable Provisions—Jurisdiction as to Order of* 22*nd May*, 1862.] A deed under the *Bankruptcy Act*, 1861, s. 192, is not to be deemed unreasonable on the ground that it postpones the payment of the debts for two years, although it gives no benefit to the creditors, except the covenant of the debtor.

Semble, a deed which is assented to by the required majority of creditors cannot be unreasonable, unless it gives them some advantage over the minority.

The omission of a debt from the schedule is not a ground on which the Court of Chancery can hold a deed to be invalid, if the requirements of the 192nd section of the *Bankruptcy Act*, 1861, are satisfied.

The question of compliance with the General Order of the 22nd of May, 1862, is not one to be considered by a Court of Equity.

In re RICHMOND HILL HOTEL COMPANY. *Ex parte* KING .. 566

ONUS OF PROOF of death within seven years 416
See PRESUMPTION OF DEATH.

OPTION OF PURCHASE *at Valuation—Specific Performance—Partnership—Refusal by the selling Partner to allow his Valuer to proceed—No Contract.*] *A.* and *B.*, being in partnership as distillers, came to an agreement whereby *B.* was to buy out *A.*, and it was agreed that if *B.* should, during *A.*'s life, be desirous of retiring, he should give notice, and *A.* should then have an option of re-purchase, on the terms that within six months after notice by *A.* the premises, goodwill, stock in trade, and all such of the subsisting contracts as *A.* should be willing to take, should be valued "in the usual way" by two valuers, one to be named by *A.*, the other by *B.*, or by the umpire of the two valuers. *B.* gave notice of his intention to retire; whereupon *A.* gave notice of his intention to re-purchase; and two valuers were appointed; but after the appointment *B.* refused to allow his valuer to proceed with the valuation:—

Held, on the authority of *Milnes* v. *Gery* (14 Ves. 400), and *Wilks* v. *Davis* (3 Mer. 507), that there was no contract between the parties which the Court could specifically enforce.

VICKERS *v.* VICKERS 529

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See EXECUTION ISSUED BEFORE WINDING-UP.

ORDER IN BANKRUPTCY of 22nd May, 1862.—Jurisdiction—Omission in schedule 566
See OMISSION OF DEBT.

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See REVIVOR.

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OUTFIT, Whether an advance 305
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PAID-UP SHARES, allotted to subscriber of memorandum 238
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See FORFEITED SHARES.

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———— Liability of, in winding-up 458
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PAYMENT OUT OF COURT—Affidavit of no settlement dispensed with 115
See AFFIDAVIT OF NO SETTLEMENT.

PECUNIARY AND RESIDUARY LEGATEES—Abatement for loss of assets 382
See LOSS OF ASSETS.

PENALTY, Charge of money due on bond limited by 467
See CHARGE.

PENALTY UNDER FOREIGN LAW, *Plea of—Discovery—Forfeiture.*] To a bill by the *United States of America*, praying an account of all moneys received by the Defendant as agent of the so-called *Government of the Confederate States of America* in this country, and consequential relief, the Defendant pleaded that, by an Act of Congress, the property of all persons acting as agents of the *Confederate Government* was made liable to confiscation, and that proceedings *in rem* were actually pending in the *United States* to obtain a seizure of his property on the ground of such agency; that no pardon had been extended to Defendant; and that it was inequitable for the *United States* to sue for relief in this Court without first waiving the forfeiture, and abandoning the proceedings *in rem.*

Plea allowed on the ground that he who seeks equity must do equity, and that the Plaintiffs were not entitled to the assistance of equity in this country to obtain the moneys held by the Defendant as agent, without waiving the forfeiture to which his agency exposed him in the *United States.*

The case distinguished from *The King of the Two Sicilies* v. *Willcox* (1 Sim. (N.S.) 310), by the admission by the Plaintiffs, upon the present record, of the facts averred in the plea in bar of the discovery and relief sought by the bill.

UNITED STATES OF AMERICA *v.* MCRAE 327

PERMANENT BUILDING SOCIETY — *Winding-up — Liabilities of unadvanced Shareholders inter se—Call to adjust Rights.*] By the rules of a permanent building society, established in 1850, it was provided that the ultimate value of each share should be £120, and the monthly subscriptions on each share 10s.; that members should join

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in successive batches, and that all members should continue to pay for the term of fourteen years, or till such time as each of the shares of the same date should have attained £120. It was provided that any shareholder who should be desirous of withdrawing might do so on giving one month's notice in writing, and such shareholder should receive back the subscriptions then paid, with interest at 5 per cent.; and that if more than one shareholder should give notice to withdraw at one time they should be paid in rotation according to priority of notice. It was also provided that the funds of the society should belong to the members in proportion to the time they had been subscribers, and that no dissolution should be completed until the close and maturity of all shares then in existence.

Losses having been incurred through the frauds of a secretary, the society was, in March, 1865, wound up. All debts having been paid, there remained a surplus sufficient to pay each shareholder about 10s. in the pound on the value of his shares, according to the period of his subscription at the date of the winding-up order. A call having been made to adjust the rights of the contributories, *inter se*, upon summons by the official liquidator to discharge the order:—

Held, that the assets of the company belonged to the members *pro ratâ* according to their respective periods of subscription; that a call, in order to equalise the value of all the shares, was not necessary or proper; and order for call discharged.

In re DONCASTER PERMANENT BUILDING SOCIETY 579

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———— Declaration of future right 310
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———— Application of deposit under 15 & 16 Vict. c. 86, s. 48 .. 156
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———— Examination of witness in winding-up 453
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———— Sanction of Court to suit by official liquidator 123
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See SUIT CHARGING WILFUL DEFAULT.

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PRACTICE—Form of suit by unregistered company 695
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PRECATORY TRUST.] Bequest "of all my property to my husband, hoping he will leave it after his death to my son, if he is worthy of it," accompanied by the following explanation: "My reason for leaving all I have to dispose of to my husband, and in his entire power, is, that my son is already certain of a fortune, and that I cannot now feel any certainty what sort of character he may become. I therefore leave it to my husband, in whose honour, justice, and parental affection I have the fullest confidence. If my son dies before my husband, though I leave all without reservation to my dear husband to dispose of as he thinks fit, yet should my son leave any children, I do not doubt it will go to them from him, knowing his steady principles, and clear judgment of right and wrong, and his sense of justice:"—
Held, not to create a trust.
EATON *v.* WATTS 151

PREMIUM FOR ARTICLES abandoned on advance 305
See ADVANCES.

PRESCRIPTION as to light for special purpose 421
See LIGHT FOR SPECIAL PURPOSE.

PRESUMPTION OF DEATH—*Expiration of Seven Years.*] Where a man has not been heard of for seven years, there can be no presumption of his death until the expiration of that period; those who allege the death within that period are bound to prove the fact. Consequently, where a legacy was left to a man who was last heard of in 1854, by a testator who died in 1860, the legacy was held not to have lapsed, but to be payable to his personal representatives.
In re BENHAM'S TRUST 416

PRICE OF COMMISSION on advance 305
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PRINCIPAL AND SURETY—Release of surety 45
See RELEASE OF SURETY.

PRIORITY between stop orders 462
See STOP ORDER.

PRIORITY FROM NEGLIGENCE—*Mortgage—Deposit of Deeds.*] *A.*, having contracted to purchase an advowson, borrowed from *B.* £2500, and covenanted with him to pay for and convey the advowson to him within six months. *A.* completed the purchase of the advowson, but never conveyed it under the covenant. He subsequently borrowed £1000 from *C.*, and covenanted to convey to him the advowson, and deposited with him the title deeds, but there was no conveyance of the legal estate:—
Held, that the first mortgage must be postponed to the second.
LAYARD *v.* MAUD 397

PRIVILEGE of documents as to compromise 254
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PRIVITY OF CONTRACT on successive sales in Stock Exchange .. 572
See SHARES—CUSTOM OF STOCK EXCHANGE.

PRODUCTION of court rolls in suit, without fees 1
See COURT ROLLS.

PRODUCTION OF DOCUMENTS *as to Compromise — Privilege — Practice.*] A party to a suit cannot be required to produce documents relating to the compromise of a dispute between himself and a person not a party to the suit.
WARRICK *v.* QUEEN'S COLLEGE, OXFORD (No. 2) 254

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PROOF IN BANKRUPTCY, Retainer by executor after 675
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PROVISO for deduction from residuary share, Failure of 40
See RESIDUE.

QUORUM OF DIRECTORS, *What, necessary for Forfeiture—Register—Winding-up—Contributory.*] Where the articles of association of a company do not prescribe the number of directors required to constitute a quorum, the number who usually act in conducting the business of the company will constitute a quorum.

A forfeiture of shares by two out of six directors held valid.

Where shares have been forfeited by a valid resolution of directors, it is immaterial that the name of the owner has not been removed from the register of members.

In re TAVISTOCK IRONWORKS COMPANY. LYSTER'S CASE .. 233

RAILWAY COMPANY, Lessor's license for sale to 112
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————————, Purchase of lease and reversion by 310
See DECLARATION OF FUTURE RIGHT.

————————, Injunction against obstruction by 174
See TRESPASS.

RECTIFICATION of voluntary settlement 30
See VOLUNTARY SETTLEMENT.

RECTIFICATION OF REGISTER *after Winding-up—Transfer*—25 & 26 *Vict. c.* 89, *s.* 35.] Upon the purchase of shares in a banking company, the transfer was executed by both transferor and transferee, and left at the office of the company by the transferee for registration, the day before the company stopped payment. A voluntary winding-up was ordered to be continued under the supervision of the Court, and the liquidators registered all the transfers lying at the office :—

Held, that the Court had power, under the 35th section of the *Companies Act*, 1862, to rectify the register; and ordered that the name of the transferee should stand on the register and the list of contributories in place of that of the transferor.

In re OVEREND, GURNEY, AND CO. WARD AND GARFIT'S CASE 189

REFERENTIAL BEQUEST—*Intention of Testator.*] A testator gave his real and personal estate to trustees as to one-fourth to *A.* for life, and, after her decease, in trust for her children, and in default of children, in trust for *B.*, *C.*, and *D.*, and their issue, in the same manner as thereinafter directed respecting their original shares; as to one other fourth to *B.* for life, and, after his decease, in trust for his children, and, in default of children, in trust for *A.*, *C.*, and *D.*, and their issue, in the same manner as directed respecting their original shares; as to one other fourth part upon trust for *C.* and her children by reference to the share of *A.* using the same referential expressions as are next given concerning the remaining share; and the fourth share he bequeathed upon trust for the benefit of *D.* and his children upon the trusts, and subject to the powers and authorities, and with the like remainders over in default of issue, and similar and in all respects corresponding with the trusts, powers, and authorities expressed and declared concerning the one-fourth share bequeathed in

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trust for *B.* and his children as effectually as if the same trusts were there repeated. *D.* died unmarried :—

Held, that the fourth share went over, upon the death of *D.* without issue, to the other three legatees, *A.*, *B.*, and *C.*

SURTEES *v.* HOPKINSON 98

REGISTER, Correction of, whether necessary for forfeiture 233
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See LAND TAX.

REGULATIONS as to solicitors' fees and charges, construction of .. 352
See SCALE OF COSTS.

RELEASE OF SURETY—*Joint and several Bond by Principal and Sureties—Non-execution by Principal.*] A surety, who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of his.

COOPER *v.* EVANS 45

REMOVAL OF LIQUIDATORS—*Voluntary Winding-up under Supervision—Authority of Court—Companies Act*, 1862, *ss.* 141, 150.] When a company is being wound up voluntarily under the supervision of the Court, the Court has a discretionary power to remove the liquidators appointed by the company without any proof of misconduct or unfitness on their part, if, having regard to all the circumstances, it is of opinion that their removal will conduce to the more efficient winding up of the company.

In re MARSEILLES EXTENSION RAILWAY AND LAND COMPANY .. 692

RESIDUARY AND PECUNIARY LEGATEES—Abatement for loss of assets 382
See LOSS OF ASSETS.

RESIDUARY OR SPECIFIC legacy 37
See LEGACY, RESIDUARY OR SPECIFIC.

RESIDUE *in Shares subject to Proviso for Deduction—Failure of Proviso as to one held to import Failure as to all.*] A testator, who had been twice married, and had three sons by the first marriage, and a son and a daughter by the second, gave his residuary estate to his five children, share and share alike, the shares of his sons to be payable at twenty-one, and of his daughter at that age or upon marriage, with a gift over in case of death before the shares became payable; and he directed that in case his three children by his first wife should receive any moneys which should become payable to them as the children of their mother, such moneys should be considered as a deduction from the shares of such children, it being his desire that all his children should share and share alike. After the eldest child attained twenty-one, but before any of the rest attained that age, the children of the first marriage became entitled to a fund as children of their mother :—

Held, that, as the share of this fund coming to the eldest son could not be deducted from his share of the residue, and it was the intention of the testator that the proviso in his will should operate on all the children alike, no deduction could be made from the shares of the other children of the said marriage.

STARES *v.* PENTON 40

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RESIDUE, Ascertainment of, after illegal gift of uncertain amount .. 521
See CHARITY WHICH HAS CEASED.

————, Deduction from, of value derived *aliunde* 40
See RESIDUE.

RETAINER *by Executor—Proof in Bankruptcy—Set-off.*] A residuary legatee of a testator, part of whose assets consisted of a debt, died intestate, leaving the debtor one of his next of kin:—

Held, that the administratrix *de bonis non* of the testator, who was also administratrix of the intestate, could not retain the debt out of the debtor's distributive share in the intestate's estate.

The executor of the testator proved the debt under the debtor's bankruptcy, and received a dividend on the proof:—

Held, that he had not thereby abandoned or lost the right to retain the debt, less the dividend, out of the share of the bankrupt, as one of the residuary legatees.

STAMMERS *v.* ELLIOTT 675

REVERSIONARY INTEREST *of Divorced Wife—Subsequent Death of Tenant for Life—Survivorship of Divorced Husband.*] By a decree of the Court of Divorce, a marriage between a husband and wife was declared to be dissolved. At the date of the decree the wife was entitled to a reversionary interest in a sum of stock which was not settled before her marriage, and had been the subject of a post-nuptial settlement. After the decree, the fund fell into possession, and the divorced wife took steps to realize the fund, but before it was recovered she died:—

Held, that the same consequences as to property must follow the declaration of dissolution by the Divorce Court, as if the marriage contract had been annihilated and the marriage tie broken on that date; that those rights of the divorced husband which depended upon the contract, ceased at the same date; and that the executors of the divorced wife were entitled to the fund.

WILKINSON *v.* GIBSON 162

REVIEW, BILL OF—Wilful default 13
See SUIT CHARGING WILFUL DEFAULT.

REVIVOR *in abated Suit—Practice—Notice to Plaintiff—Motion to discharge—Title of Notice of Motion.*] An order of revivor, obtained by Defendant to prosecute a suit which has become abated by the death of another Defendant after decree, is irregular when obtained without notice to the Plaintiff, though the Plaintiff is a trustee who has no substantial interest in the suit.

A notice of motion to discharge an order so obtained is properly intituled in the matter of the abated suit.

STRATFORD *v.* BAKER 256

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RULE IN WILD'S CASE—Gift to *A.* and *B.* and their children .. 180
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SALARY *of Manager—Compensation in Winding-up.*] Principle upon which the amount for salary and compensation payable to the manager of a company in respect of his engagement, which has been suddenly terminated by the winding up of the company, will be calculated

In re ENGLISH JOINT STOCK BANK. YELLAND'S CASE 350

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See OFFICIAL LIQUIDATOR.

SCALE OF COSTS—*Consolidated Order* XXXVIII. *rule* 2—*Regulation as to Solicitors' Fees and Charges.*] The costs of a suit for the purpose of establishing a right to property against an alleged agent, who has denied the agency, and claimed the property as his own, do not come within the lower scale; although the property in question is under the amount or value of £1000.

Principles on which the Regulations as to Solicitors' Fees and Charges are to be construed, discussed.

EARL OF STAMFORD *v.* DAWSON 352

SCOTCH ESTATE 407
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SCOTCH SETTLEMENT—*Will—Scotch Heritable Bond—Locke King's Act* (17 & 18 *Vict. c.* 113)—*Direction for Payment of Debts—Exoneration of Mortgaged Estate—Election—Maintenance, additional or substitutional.*] A domiciled Englishman executed a trust disposition and settlement, in the Scotch form, of an estate in *Scotland*. He then made an English will, declaring that it should not affect the previous settlement of his Scotch estate, and charged his residuary real and personal estate with payment of his debts. He subsequently charged the Scotch estate with £14,000, by means of a Scotch heritable bond:—

Held, that the residuary estate was liable to payment of the £14,000 in exoneration of the Scotch estate.

After the date of his will the testator purchased other freehold property in *Scotland*, which passed by intestacy to his heir:—

Held, that the heir was not bound to elect, but had the same right to that property which he would have had if there had been no will.

The before-mentioned trust disposition and settlement provided a fund for the maintenance, education, and advancement of the settlor's children; and his will gave power to the trustees to make advances to the children during minority for maintenance and education:—

Held, that the provisions in the will were to be considered as additional to, and not substitutional for, the provisions for the like purpose in the settlement.

MAXWELL *v.* HYSLOP 407

SECURITIES FOR BILL OF EXCHANGE—*Insolvency of Acceptor and Drawer—Appropriation.*] The principle established in *Ex parte Waring* (19 Ves. 345), that securities held by a banker against his acceptances are available to the bill holders, if both acceptor and drawer are insolvent, does not apply where the acceptor or drawer is a joint stock company which has been ordered to be wound up, unless it be shown that the company is actually insolvent.

Semble, the rule in *Ex parte Waring* does not apply where the acceptors are creditors of the drawers to an amount exceeding that due on the bills, at least if the acceptors have a general lien on securities deposited with them.

In re NEW ZEALAND BANKING CORPORATION. HICKIE & Co.'s CASE 226

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————————, Cancelling and rectification of voluntary 30
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SEVEN YEARS, Presumption of death after 416
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SHAREHOLDER, Liability of devisees of 123
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SHARES—CUSTOM OF STOCK EXCHANGE—*Sale and Purchase through Brokers—Privity of Contract—Non-execution by Transferee—Ignorance of Purchaser a Defence.*] By the practice of the *London Stock Exchange*, the property in shares, when sold on the Exchange, is considered to pass from one member to the other, by force of the contract, without the execution of any transfer, until the settling-day arrives, when the broker of the original vendor calls upon the broker to whom he has sold to name the purchaser, and the name so furnished is inserted in the transfer deeds; the first purchaser paying to the original vendor, if the shares have fallen, the difference between the original selling price and the ultimate purchaser's price.

Plaintiff, the registered owner of shares in a company on which £5 had been paid, sold them on the *London Stock Exchange*, through *C.*, his broker, to *M.*, another broker. A few days afterwards, the Defendant, through his brokers, bought on the Exchange a different number of shares in the same company at a lower price; a call having been announced in the meantime, which threw down the value of the shares, but of which call the Defendant when he purchased was not aware. On the settling-day, *M.*, on being called upon by the Plaintiff's broker, gave the name of the Defendant as purchaser, whose name was thereupon inserted in the transfer deeds as transferee, and they were executed by the Plaintiff, the consideration being left in blank. Afterwards, the Plaintiff's brokers, on receiving the purchaser's price, filled in the deeds with that amount; and having received the difference from *M.*, paid the Plaintiff in full, and handed the transfer deeds and share certificates to the Defendant, who took them away. The Defendant did not execute the transfers, or get himself registered; and, upon the company becoming insolvent and being wound up, a call having been made by the liquidator, the Plaintiff (who had paid the directors' call) filed a bill to compel the Defendant to take to the shares:—

Held that, as the Defendant bought the shares without knowledge of the call, the payment of which was necessary to enable him to become registered, and which he could not compel the Plaintiff to pay, the

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Plaintiff (being the legal owner) could not enforce an equitable title against the Defendant; and bill dismissed with costs.

Whether, apart from the special circumstances of this case, there is a privity between a vendor and the ultimate purchaser in a transaction of this nature—*quære.*

HAWKINS *v.* MALTBY 572

SHARES, Acceptance of, when complete 9
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——— in land society not within Mortmain Act 272
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SHARES IN LAND SOCIETIES *not within Mortmain Act—Will—Charity—Mortmain—9 Geo. 2, c. 36.*] Shares in the *British Land Company*, the business of which was purchasing and improving lands, and selling or letting the same, and in the *National Freehold Land Society*, established for "raising by subscription a fund out of which any member should receive the amount of his share for the erection or purchase of a dwelling-house, or other real or leasehold estate," held not to be an interest in land within the statute 9 Geo. 2, c. 36.

ENTWISTLE *v.* DAVIS 272

SHIP CHARTERED BY PURCHASER—*Stoppage in Transitu.*] *A.*, a merchant in *Sweden*, contracted to sell timber to *B.*, a firm in *London*, it being provided by the contract, in the first instance, that the price of the timber to be shipped to *London* was "free on board," payable by buyer's acceptance of seller's drafts at six months from date of bills of lading, the vendor to provide ships for conveyance of the timber to *London*.

By subsequent agreement, a ship was chartered for the purpose by *B.*, on which the timber was shipped by *A.*, who caused the bill of lading to be drawn in his name as shipper of the timber, which was made deliverable "unto order or assigns." The bill of lading, in this form, was indorsed in blank by *A.*, and sent to *B.* in return for his acceptance of a bill of exchange drawn upon him by *A.* for the price of the timber.

The ship was forced to put into *Copenhagen* in distress, and while there *B.* stopped payment, and *A.* gave notice of stoppage *in transitu*:—

Held, that the effect of the delivery of the timber on board the chartered ship, coupled with the form of the bills of lading adopted by *A.* for his security, in which the timber was made deliverable "unto order or assigns," was to interpose the master as a carrier between *A.* and *B.*, so as to preserve the right of stoppage *in transitu* until the ship, the instrument of transit, had reached *London*.

BERNDTSON *v.* STRANG 481

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SPECIAL ACT—*Winding-up of Company incorporated by—Just and Equitable Clause*—25 & 26 *Vict.* c. 89, s. 199.] Winding-up order made in the case of a canal company incorporated by special Act of Parliament, on the ground of its being just and equitable, under the 199th section of the Act of 1862, the canal being worked at a loss.
In re WEY AND ARUN JUNCTION CANAL COMPANY 197

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41 Geo. 3, c. 109 613
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STOP ORDER—*Priority—Fund in Court—Mortgage.*] A person being entitled to an undivided share of a fund in Court, mortgaged it to *A.*, who obtained a stop order on the fund. An order was subsequently made for the distribution of the fund, and the share of the mortgagor was carried over to the account of him and his incumbrancers. *B.*, a mortgagee subsequent in time to *A.*, then obtained a stop order on the fund so carried over to a separate account:—

Held, that *B.* did not thereby gain priority over *A.*

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SUBSCRIBER OF MEMORANDUM, *Liability of—Allotment of paid-up Shares—Companies Act*, 1862, *s.* 23.] The subscribers of the memorandum of association of a company under the *Companies Act*, 1862, are, by the 23rd section of the Act, bound to take as many shares as they have subscribed for, whether or not the shares are actually allotted to them, and this obligation is not satisfied by the allotment at a subsequent period of nominally fully paid-up shares.

Therefore, where *M.* subscribed the memorandum of a company for five shares, and eight months afterwards five fully paid-up shares, which the company had agreed to allot to *C.* as part of the purchase-money for property sold to them by *C.*, were by *C.'s* direction allotted to *M.*, and the company was wound up:—

Held, that *M.* was a contributory in respect of five shares upon which nothing had been paid.

In re SOUTH BLACKPOOL HOTEL COMPANY. MIGOTTI'S CASE .. 238

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SUIT CHARGING WILFUL DEFAULT *after Decree in former Suit—Supplemental Bill in nature of Bill of Review—Practice.*] Where a bill was filed by a legatee against executors, seeking to charge them with a sum which they might have received but for their wilful default, and an administration decree had already been made in a suit by the executors, to which the present Plaintiff was a party, under which the usual accounts and inquiries were directed:

Held, that it was a supplemental bill, in the nature of a bill of review, which could not be filed without the leave of the Court.

A Defendant to an administration suit instituted by executors can allege by his answer, and prove by evidence, a case of wilful default against the executors, when the necessary inquiries and directions will be added to the decree, without a cross bill being filed.

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See SUIT CHARGING WILFUL DEFAULT.

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THELLUSSON ACT—Accumulations by operation of law 467
See ACCUMULATIONS.

THIRD PARTY CLAUSE—*Solicitor and Client—Trustee and Cestui que Trust—Costs—Taxation*—6 & 7 *Vict. c.* 73, *s.* 38.] The rule that the taxation of a bill under the third party clause (6 & 7 Vict. c. 73, s. 38) is as between solicitor and client, is subject to this limitation, that a solicitor cannot charge against a trust estate anything not necessary for the administration thereof, though expressly directed by the trustee; but must look for payment of such charges to the trustee personally.
In re BROWN, A SOLICITOR 464

TIME OF VESTING—*Gift to Class as they attain twenty-one—Period of Vesting.*] Bequest of a sum of stock to be divided, after the death of an annuitant, between all the children of *A. B.* as they should attain his or her age of twenty-one years:—
Held, that the fund was to go to such of the children of *A. B.* as were living when the first attained twenty-one, and who had attained, or who should attain, twenty-one.
LOCKE *v.* LAMB 372

TRANSFEREE put on register after winding-up 189
See RECTIFICATION OF REGISTER.

TRESPASS *by Stranger—Irreparable Injury—Injunction.*] A bill was filed to restrain a railway company from placing an obstruction, partly on a public footway and partly on land belonging to the Plaintiffs, a rival railway company, so as to block up the access to a station of the Plaintiffs, and alleged that the injury to the traffic by allowing the obstruction to remain would be irreparable, and that the act was done without any colour of title by the Defendants:—
Held, that this was one of the exceptional cases in which this Court would interfere to restrain a trespass by a stranger, and demurrer overruled.
LONDON AND NORTH-WESTERN RAILWAY COMPANY *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY 174

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See THIRD PARTY CLAUSE.

TRUSTS, CONSTRUCTIVE—*County Court Equitable Jurisdiction*—28 & 29 *Vict. c.* 99, *s.* 1.] Constructive trusts are within the jurisdiction of County Courts under 28 & 29 Vict. c. 99, s. 1.
CLAYTON *v.* RENTON 158

UNITED STATES, Plea of penalty under law of 327
See PENALTY UNDER FOREIGN LAW.

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See OMISSION OF DEBT.

UNREGISTERED COMPANY, *Legality of—Joint Stock Companies Acts—Right to sue.*] A trade partnership of more than twenty-five persons, formed before the passing of the 7 & 8 Vict. c. 110, and formally registered under the 58th section of that Act, but not otherwise registered, is not illegal, and a suit in equity may be instituted by some of the partners on behalf of themselves and all the others.
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VESTING, TIME OF—Gift to class as they attain twenty-one 372
See TIME OF VESTING.

VOLUNTARY SETTLEMENT, *Rectification of—Incomplete Trust—Cancellation of Deed—Refunding.*] Where a sum of money was, without valuable consideration, placed in the hands of a trustee, to be held upon certain trusts then declared; and it was agreed that the transaction should be ratified and completed by the execution of a deed, and a deed was afterwards prepared and executed, which was wholly inconsistent with the trusts declared by parol; the Court ordered such deed to be delivered up and cancelled, and the money repaid to the settlor, who had executed the deed in ignorance of its legal effect.
The circumstances under which a voluntary settlement may be rectified, considered.
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WILD'S CASE, RULE IN—*Gift to A. and B. and their Children—House and Furniture.*] Devise of house to my nieces *Louisa* and *Emily*, and to their children, and if they have not any, to their brother *William* and his children; "the furniture to go with the house." Neither of the nieces had a child at the date of the will, but both had children born afterwards:—
Held, that the rule in *Wild's Case* (6 Rep. 16 b.) was not inflexible, and that the gift of the furniture was a sufficient reason for not vesting estates tail in the nieces; and, therefore, that the nieces took the house and furniture for their lives, with immediate remainders to the children of each coming into *esse* during the lives of the nieces.
GRIEVE *v.* GRIEVE 180

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———— "As they shall attain twenty-one" 372
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YOUNGER SON BECOMING ELDEST—*Gift to all the Children of A., except F., the Eldest Son.*] Testator bequeathed £20,000 to his son *A.* for life, with remainder, "in case *F.*, the eldest son of *A.*, shall be living," to *F.* for life, with remainder to his children, and in default of children to the other sons of *A.* successively, in strict settlement. He also bequeathed a share of the residue to *A.* for life, with remainder to "all the children of *A.*, except *F.*" *F.* died in the lifetime of *A.*, unmarried, when *B.* became the eldest son of *A.*, and entitled on *A.*'s death to a life interest in the legacy of £20,000:—

Held, that, notwithstanding *B.* having become the eldest son, he was entitled to a share in the residue, and that the representatives of *F.* were excluded.

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See "ELDEST SON."

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